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Volume II

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Supplement No. 40 (A/54/40)

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VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 574/1994, Kim v. Republic of Korea (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Keun-Tae Kim (represented by Mr. Yong Whan Cho, Duksu Law Offices, in Seoul)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	27 September 1993
Date of decision on admissibility:	14 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No.574/1994 submitted to the Human Rights Committee by Mr. Keun-Tae Kim, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Keun-Tae Kim, a Korean citizen residing in Dobong-Ku, Seoul, Republic of Korea. He claims to be a victim of violations by the Republic of Korea of article 19, paragraph 2, of the International Covenant on Civil and Political Rights. He is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdalla Zakhia. The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

The facts as submitted by the author

2.1 The author is a founding member of the National Coalition for Democratic Movement (Chunminryum; hereinafter NCDM). He was the Chief of the Policy Planning Committee and Chairman of the Executive Committee of that organization. Together with other NCDM members, he prepared documents which criticized the Government of the Republic of Korea and its foreign allies, and appealed for national reunification. At the inaugural meeting of the NCDM on 21 January 1989, these documents were distributed and read out to approximately 4,000 participants; the author was arrested at the conclusion of the meeting.

2.2 On 24 August 1990, a single judge on the Criminal District Court of Seoul found the author guilty of offences against article 7, paragraphs 1 and 5, of the National Security Law, the Law on Assembly and Demonstrations and the Law on Repression of Violent Activities, and sentenced him to three years' imprisonment and one year of suspension of eligibility. The Appeal Section of the same tribunal dismissed Mr. Kim's appeal on 11 January 1991, but reduced the sentence to two years' imprisonment. On 26 April 1991, the Supreme Court dismissed a further appeal. It is submitted that as the Constitutional Court had held, on 2 April 1990, that article 7, paragraphs 1 and 5, of the National Security Law, are not inconsistent with the Constitution, the author has exhausted all available domestic remedies.

2.3 The present complaint only relates to the author's conviction under article 7, paragraphs 1 and 5, of the National Security Law. Paragraph 1 provides that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished". Paragraph 5 stipulates that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished". On 2 April 1990, the Constitutional Court held that these provisions are compatible with the Constitution as they are applied [only] when the security of the State is endangered, or when the incriminated activities undermine the basic democratic order.

2.4 The author has provided English translations of the relevant parts of the Courts' judgements, which show that the first instance trial court found that North Korea is an anti-State organization, with the object of violently changing the situation in South Korea. According to the Court, the author, despite knowledge of these aims, produced written material which reflected the views of North Korea and the Court concluded therefore that the author produced and distributed the written material with the object of siding with and benefiting the anti-State organization.

2.5 The author appealed the judgement of 24 August 1990 on the following grounds:

- although the documents produced and distributed by him contain ideas resembling those which the regime of North Korea advocates, the judge misinterpreted the facts, as the overall message in the documents was "the accomplishment of reunification through independence and democratization". It thus cannot be said that the author either praised or encouraged the activities of North Korea, or that the contents of the documents were of direct benefit to the North Korean regime;

- the prohibited acts and the concepts spelled out in paragraphs 1 and 5 of article 7 of the National Security Law are defined in such broad and ambiguous terms that these provisions violated the principle of legality, that is, article 21, paragraph 1, of the Constitution, which provides that freedoms and rights of citizens may be restricted by law only when absolutely necessary for national security, maintenance of law and order, public welfare, and that such restrictions may not violate essential aspects of fundamental rights; and

- in light of the findings of the Constitutional Court, the application of these provisions should be suspended for activities which carry no obvious danger for national security or the survival of democratic order. Since the incriminated material was not produced and distributed with the purpose of praising North Korea, and further does not contain any information which would obviously endanger either survival or security of the Republic of Korea, or its democratic order, the author should not be punished.

2.6 The appellate court upheld the conviction on the basis that the evidence showed that the author's written materials, which he read out at a large convention, argued that the Republic of Korea was under influence of foreign powers, defined the Government as a military dictatorship and contained other views which corresponded to North Korean propaganda. According to the Court the materials therefore advocated the policy of North Korea, and the first instance court had thus sufficient grounds to acknowledge that the author was siding with and benefiting an anti-State organization.

2.7 On 26 April 1991, the Supreme Court held that the relevant provisions of the National Security Law did not violate the Constitution so long as they were applied to a case where an activity puts national survival and security at stake or endangers basic liberal democratic order. Thus under article 7 (1) "activity which sides with ... and benefits" an anti-State organization means that if such activity could be beneficial to that organization objectively, the prohibition applies. The prohibition is applicable, if a person with normal mentality, intelligence and common sense acknowledges that the activity in question could be beneficial to the anti-state organization, or if there is wilful recognition that it could be beneficial. According to the Supreme Court, this implies that it is not necessary for the person concerned to have intentional acknowledgement or motivation to be "beneficial". The court went on to hold that the author and his colleagues had produced material which can be recognised, as a whole and objectively, to side with North Korean propaganda and that the author, who has normal intelligence and common sense, read it out and supported it, thereby objectively acknowledging that his activities could be beneficial to North Korea.

2.8 On 10 May 1991, the National Assembly passed a number of amendments to the National Security Law; paragraphs 1 and 5 of article 7 were amended by the addition of the words "with the knowledge that it will endanger national security or survival, or the free and democratic order" to the previous provisions.

The complaint

3.1 Counsel contends that although article 21, paragraph 1, of the Korean Constitution provides that "all citizens shall enjoy freedom of speech, press, assembly and association", article 7 of the National Security Law has often been applied to restrict freedom of thought, conscience or expression through speech or publication, by acts, association, etc. Under this provision, anyone who supports or thinks in positive terms about socialism, communism or the political system of North Korea is liable to punishment. It is further argued that there have been numerous cases in which this provision was applied to punish those who criticized government policies, because their criticism happened to be similar to that proffered by the North Korean regime against South Korea. In counsel's view, the author's case is a model of such abusive application of the National Security Law, in violation of article 19, paragraph 2, of the Covenant.

3.2 It is further argued that the courts' reasoning clearly shows how the National Security Law is manipulated to restrict freedom of expression, on the basis of the following considerations contrary to article 19 of the Covenant. First, the courts found that the author held opinions which were critical of the policies of the Government of the Republic of Korea; secondly, North Korea has criticized the Government of South Korea in that it distorts South Korean reality; thirdly, North Korea is characterized as an anti-State organization, which has been formed for the purpose of upstaging the government of South Korea (article 2 of the National Security Law); fourthly, the author wrote and published material containing criticism similar to that voiced by North Korea vis-à-vis South Korea; fifthly, the author must have known about that criticism; and, finally, the author's activities must have been undertaken for the benefit of North Korea and therefore amount to praise and encouragement of that country's regime.

3.3 Counsel refers to the Comments of the Human Rights Committee which were adopted after consideration of the initial report of the Republic of Korea under article 40 of the Covenant.[1] Here, the Committee observed that:

> "[Its] main concern relates to the continued operation of the National Security Law. Although the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security. Furthermore, some issues addressed by the National Security Law are defined in somewhat vague terms, allowing for broad interpretation that may result in sanctioning acts that may not truly be dangerous for State security [...] [T]he Committee recommends that the State party intensify its efforts to bring its legislation more into line with the provisions of the Covenant. To that end, a serious attempt ought to be made to phase out the National Security Law which the Committee perceives as a major obstacle to the full realization of the rights enshrined in the Covenant and, in the meantime, not to derogate from certain basic rights [...]."

3.4 Finally, it is contended that although the events for which the author was convicted and sentenced occurred before the entry into force of the Covenant for the Republic of Korea on 10 July 1990, the courts delivered their decisions in the case after that date and therefore should have applied article 19, paragraph 2, of the Covenant in the case.

State party's information and observations on admissibility and author's comments thereon

4.1 In its submission under rule 91 of the rules of procedure, the State party argues that as the communication is based on events which occurred prior to the entry into force of the Covenant for the Republic of Korea, the complaint is inadmissible ratione temporis inasmuch as it is based on these events.

4.2 The State party acknowledges that the author was found guilty on charges of violating the National Security Law from January 1989 to May 1990. It adds, however, that the complaint fails to mention that Mr. Kim was also convicted for organizing illegal demonstrations and instigating acts of violence on several occasions during the period from January 1989 to May 1990. During these demonstrations, according to the State party, participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set 13 vehicles on fire and injured 134 policemen". These events all took place before 10 July 1990, date of entry into force of the Covenant for the State party: they are thus said to be outside the Committee's competence ratione temporis.

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[1] Adopted at the Committee's forty-fifth session (July 1992); see Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), paras. 515 and 518.

4.3 For events occurring after 10 July 1990, the question is whether the rights protected under the Covenant were guaranteed to Mr. Kim. The State party contends that all rights of Mr. Kim under the Covenant, in particular his rights under article 14, were observed between the date of his arrest (13 May 1990) and that of his release (12 August 1992).

4.4 Concerning the alleged violation of article 19, paragraph 2, of the Covenant, the State party argues that the author has failed to identify clearly the basis of his claim and that he has merely based it on the assumption that certain provisions of the National Security Law are incompatible with the Covenant, and that criminal charges based on these provisions of the National Security Law violate article 19, paragraph 2. The State party submits that such a claim is outside the Committee's scope of jurisdiction; it argues that under the Covenant and the Optional Protocol, the Committee cannot consider the (abstract) compatibility of a particular law, or the provisions of a State party's law, with the Covenant. Reference is made to the Views of the Human Rights Committee on communication No. 55/1979,[2] which are said to support the State party's conclusions.

4.5 On the basis of the above, the State party requests the Committee to declare the communication inadmissible both ratione temporis, inasmuch as events prior to 10 July 1990 are concerned, and because of the author's failure to substantiate a violation of his rights under the Covenant for events which occurred after that date.

5.1 In his comments, the author notes that what is at issue in his case are not the events (i.e. before 10 July 1990) which initiated the violations of his rights, but the subsequent judicial procedures which led to his conviction by the courts. Thus, he was punished, after the entry into force of the Covenant for the Republic of Korea for having contravened the National Security Law. He notes that as his activities were only the peaceful expression of his opinions and thoughts within the meaning of article 19, paragraph 2, of the Covenant, the State party had a duty to protect the peaceful exercise of this right. In this context, the State authorities and in particular the courts were duty-bound to apply the relevant provisions of the Covenant according to their ordinary meaning. In the instant case, the courts did not consider article 19, paragraph 2, of the Covenant when trying and convicting the author. In short, to punish the author for exercising his right to freedom of expression after the Covenant became effective for the Republic of Korea entailed a violation of his right under article 19, paragraph 2.

5.2 Counsel observes that the so-called illegal demonstrations and acts of violence referred to by the State party are irrelevant to the instant case; what he raises before the Committee does not concern the occasions on which he was punished for having organized demonstrations. This does not mean, counsel adds, that his client's conviction under the Law on Demonstrations and Assembly were reasonable and proper: it is said to be common that leaders of opposition groups in the Republic of Korea are convicted for each and every demonstration staged anywhere in the country, under an "implied conspiracy theory".

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[2] Case No. 55/1979 (Alexander MacIsaac v. Canada), Views adopted on 14 October 1982, paras. 10-12.

5.3 The author reiterates that he has not raised the issue of the National Security Law's compatibility with the Covenant. He does indeed express his view that, as the Committee acknowledged in its Concluding Comments on the State party's initial report, the said law remains a serious obstacle to the full realization of Covenant rights. However, he stresses that his communication concerns "solely the fact that he was punished for his peaceful exercise of the right to freedom of expression, in violation of article 19, paragraph 2, of the Covenant".

Committee's decision on admissibility

6.1 At its 56th session, the Committee considered the admissibility of the communication.

6.2 The Committee took note of the State party's argument that as the present case was based on events which occurred prior to the entry into force of the Covenant and the Optional Protocol for the Republic of Korea, it should be deemed inadmissible ratione temporis. In the instant case the Committee did not have to refer to its jurisprudence under which the effects of a violation that continued after the Covenant entered into force for the State party might themselves constitute a violation of the Covenant, since the violation alleged by the author was his conviction under the National Security Law. As this conviction took place after the entry into force of the Covenant on 10 July 1990 (24 August 1990 for conviction; 11 January 1991 for the appeal, and 26 April 1991 for the Supreme Court's judgement), the Committee was not precluded ratione temporis from considering the author's communication.

6.3 The State party had argued that the author's rights were fully protected during the judicial procedures against him, and that he was challenging in general terms the compatibility of the National Security Law with the Covenant. The Committee did not share this assessment. The author claimed that he had been convicted under article 7, paragraphs 1 and 5, of the National Security Law, for mere acts of expression. He further claimed that no proof was presented either of specific intention to endanger state security, or of any actual harm caused thereto. These claims did not amount to an abstract challenge of the compatibility of the National Security Law with the Covenant, but to an argument that the author had been the victim of a violation by the State party of his right to freedom of expression under article 19 of the Covenant. This argument had been sufficiently substantiated to require an answer by the State party on the merits.

6.4 The Committee was satisfied, on the basis of the material before it, that the author had exhausted all available domestic remedies within the meaning of article 5, paragraph 2, of the Optional Protocol; it noted in this context that the State party had not objected to the admissibility of the case on this ground.

7. On 14 March 1996, the Human Rights Committee therefore decided that the communication was admissible inasmuch as it appeared to raise issues under article 19 of the Covenant.

State party's submission on the merits and counsel's comments

8.1 In its submission, dated 21 February 1997, the State party explains that its Constitution guarantees its citizens fundamental rights and freedoms, including the right to freedom of conscience, freedom of speech and the press and freedom of assembly and association. These freedoms and rights may be restricted by law only when necessary for national security, the maintenance of law and order or for public welfare. The Constitution stipulates further that even when such restriction is imposed, no essential aspect of the freedom or right shall be violated.

8.2 The State party submits that it maintains the National Security Law as a minimal legal means of safeguarding its democratic system which is under a constant security threat from North Korea. The law contains some provisions which partially restrict freedoms or rights for the protection of national security, in accordance with the Constitution.[3]

8.3 According to the State party, the author overstepped the limits of the right to freedom of expression. In this context, the State party refers to the reasoning by the Appeals Section of the Seoul Criminal District Court in its judgement of 11 January 1991, that there was enough evidence to conclude that the author was engaged in anti-State activities for the benefit of North Korea, and that the materials which he distributed and the demonstrations which he sponsored and which resulted in serious public disorder, posed a clear danger to the existence of the State and its free-democratic public order. In this connection, the State party argues that the exercise of freedom of expression should not only be conducted in a peaceful manner but also be directed towards a peaceful aim. The State party points out that the author produced and disseminated materials to the public by which he encouraged and propagandized the North Korean ideology of making the Korean Peninsula communist by force. Furthermore, the author organized illegal demonstrations with massive violence against the police. The State party submits that these acts caused a serious threat to the public order and security and resulted in a number of casualties.

8.4 In conclusion, the State party submits that it is firmly of the view that the Covenant does not condone any acts of violence or violence-provoking acts committed in the name of the exercise of the right to freedom of expression.

9.1 In his comments on the State party's submission, counsel reiterates that the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication. Counsel argues that the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions. Counsel therefore submits that if the expressions in question did not put the security of the country in danger, the author should not have been punished under the NSL.

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[3] Article 1 of the National Security Law reads: "The purpose of this law is to control anti-State activities which endanger the national security, so that the safety of the State as well as the existence and freedom of the citizens may be secured." Article 7, paragraph 1, reads "Any person who has praised or has encouraged or sided with the activities of an anti-State organization or its members or a person who has been under instruction form such an organization, or who has benefited an anti-State organization by other means shall be punished by penal servitude for a term not exceeding seven years." Paragraph 5 of article 7 reads: "Any person who has, for the purpose of committing the actions as stipulated in the above paragraphs, produced, imported, duplicated, kept in custody, transported, disseminated, sold or acquired documents, drawings or other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

9.2 Counsel notes that the author's electoral rights have been restored by the State party, and that the author was elected as a member of the National Assembly in the general election in April 1996. Because of this, counsel questions the grounds of the author's conviction for allegedly encouraging and propagandizing the North Korean ideology of making the Korean Peninsula communist by force.

9.3 According to counsel, the State party, through the NSL, has been stifling democracy under the banner of protecting it. In this connection, counsel argues that the essence of a democratic system is the guarantee of peaceful exercise of freedom of expression.

9.4 Counsel submits that the State party has not proved beyond reasonable doubt that the author had put the security of the country in danger by disseminating documents. According to counsel, the State party has failed to establish any relation between North Korea and the author and has failed to show what kind of threat the author's expressions had posed to the security of the country. Counsel submits that the author's use of his freedom of expression was not only peaceful but also directed towards a peaceful aim.

9.5 Finally, counsel refers to the ongoing process towards democracy in Korea, and claims that the present democratization is due to sacrifices of many people like the author. He points out that many of the country's activists who had been convicted as communists under the NSL are now playing important roles as members of the National Assembly.

10.1 In a further submission, dated 21 February 1997, the State party reiterates that the author was also convicted for organizing violent demonstrations, and emphasizes that the reasons for convicting him under the NSL were that he had aligned himself with the unification strategy of North Korea by arguing for unification in printed materials which were disseminated to about 4000 participants at the Founding Convention of the National Democratic Movement Coalition and that activities such as helping to implement North Korea's strategy constitute subversive acts against the State. In this connection, the State party notes that it has technically been at war with North Korea since 1953 and that North Korea continues to try to destabilize the country. The State party therefore argues that defensive measures designed to safeguard democracy are necessary, and maintains that the NSL is the absolute minimal legal means necessary to protect liberal democracy in the country.

10.2 The State party explains that the author's electoral rights were restored because he did not commit a second offence for a given period of time after having completed his prison term, and to facilitate national reconciliation. The State party submits that the fact that the author's rights were restored does not negate his past criminal activities.

10.3 The State party agrees with counsel that freedom of expression is one of the essential elements of a free and democratic system. It emphasizes, however, that this freedom of expression cannot be guaranteed unconditionally to people who wish to destroy and subvert the free and democratic system itself. The State party explains that the simple expression of ideologies, or academic research on ideologies, is not punishable under the NSL, even if these ideologies are incompatible with the liberal democratic system. However, acts committed under the name of freedom of speech but undermining the basic order of the liberal democratic system of the country are punishable for reasons of national security.

10.4 With regard to counsel's argument that the State party has failed to establish that a relation between the author and North Korea existed and that his actions were a serious threat to national security, the State party points out that North Korea has attempted to destabilize the country by calling for the overthrow of South Korea's "military-fascist regime" in favour of a "people's democratic government", which would bring about "unification of the fatherland" and "liberation of the people". In the documents, distributed by the author, it was argued that the Government of South Korea was seeking the continuation of the country's division and dictatorial regime; that the Korean people had been struggling for the last half century against US and Japanese neo-colonial influence, which aims at the continued division of the Korean peninsula and the oppression of the people; that nuclear weapons and American soldiers should be withdrawn from South Korea, since their presence posed a great threat to national survival and to the people; and that joint military exercises between South Korea and the USA should be stopped.

10.5 The State party submits that it is seeking peaceful unification, and not the continuation of the division as argued by the author. The State party further takes issue with the author's subjective conviction about the presence of US forces and US and Japanese influence. It points out that the presence of US forces has been an effective deterrent to prevent North Korea from making the peninsula communist through military force.

10.6 According to the State party, it is obvious that the author's arguments are the same as that of North Korea, and that his activities thus both helped North Korea and followed its strategy and tactics. The State party agrees that democracy means allowing different voices to be heard but argues that there should be a limit to certain actions so as not to cause damage to the basic order necessary for national survival. The State party submits that it is illegal to produce and distribute printed materials that praise and promote North Korean ideology and further its strategic objective to destroy the free and democratic system of the Republic of Korea. It argues that such activities, directed at furthering these violent aims, cannot be construed as peaceful.

11. Counsel for the author, by letter of 1 June 1998, informs the Committee that he has no further comments to make.

Issues and proceedings before the Committee

12.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

12.2 The Committee observes that, in accordance with article 19 of the Covenant, any restriction on the right to freedom of expression must cumulatively meet the following conditions: it must be provided by law, it must address one of the aims set out in paragraph 3 (a) and (b) of article 19 (respect of the rights and reputation of others; protection of national security or of public order, or of public health or morals), and it must be necessary to achieve a legitimate purpose.

12.3 The restriction of the author's right to freedom of expression was indeed provided by law, namely the National Security Law as it is then stood; it is clear from the courts' decisions that in this case the author would also be likely to have been convicted if he had been tried under the law as it was amended in 1991, although this is not an issue in this case. The only question before the Committee is whether the restriction on freedom of expression, as invoked against the author, was necessary for one of the purposes set out in article 19, paragraph 3. The need for careful scrutiny by the Committee is emphasised by the broad and unspecific terms in which the offence under the National Security Law is formulated.

12.4 The Committee notes that the author was convicted for having read out and distributed printed material which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war. He was convicted by the courts on the basis of a finding that he had done this with the intention of siding with the activities of the DPRK. The Supreme Court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt. Even taking that matter into account, the Committee has to consider whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19 (3) namely the protection of national security. It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) "benefit" that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary.

12.5 The Committee considers, therefore, that the State party has failed to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression, and that the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression. The Committee considers therefore that the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant.

13. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19 of the International Covenant on Civil and Political Rights.

14. Under article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy.

15. Bearing in mind that, by becoming a State party to the Optional Protocol, the Republic of Korea has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Nisuke Ando
(dissenting)

I am unable to agree with the Committee's views in this case that "the restriction of the author's right to freedom of expression was not compatible with the requirements of article 19, paragraph 3, of the Covenant". (para. 12.5)

According to the Committee, "there is no indication that the courts ... considered whether the contents of the speech [by the author] or the documents [distributed by him] had any additional effect upon the audience or readers such as to threaten public security" (para. 12.4) and "the State party has not provided specific justifications as to why over and above prosecuting the author for contraventions of the Law on Assembly and Demonstration and the Law on Punishment of Violent Activities (which forms no part of the author's complaint), it was necessary for national security, also to prosecute the author for the exercise of his freedom of expression". (para. 12.5)

However, as noted by the State party, the author was "convicted for organizing illegal demonstrations and instigating acts of violence on several occasions during the period from January 1989 to May 1990. During these demonstrations ... participants "threw thousands of Molotov cocktails and rocks at police stations, and other government offices. They also set vehicles on fire and injured 134 policemen"." (para. 4.2) In this connection the Committee itself "notes that the author was convicted for having read out and distributed printed material which expressed opinions ... coinciding with the policy statements of DPRK (North Korea), with which country the State party was formally in a state of war". (para. 12.4. See also the explanation of the State party in paras. 10.4 and 10.5)

The author's counsel argues that "the author's conviction under the Law on Demonstration and Assembly and the Law on Punishment of Violent Activities is not the issue in this communication" and that "the author's conviction under those laws cannot justify his conviction under the National Security Law for his allegedly enemy-benefiting expressions". (para. 9.1)

Nevertheless, the author's reading out and distributing the printed material in question, for which he was convicted under these laws, were the very acts for which he was convicted under the National Security law and which lead to the breach of public order as described by the State party. In fact, counsel fails to refute that the author's reading out and distributing the printed material in question did lead to the breach of public order, which might have been perceived by the State party as threatening national security.

I do share the concern of counsel that some provisions of the National Security Law are too broadly worded to prevent their abusive application and interpretation. Unfortunately, however, the fact remains that South Korea was invaded by North Korea in 1950's and the East-West détente has not fully blossomed on the Korean Peninsula yet. In any event the Committee has no information to prove that the aforementioned acts of the author did not entail the breach of public order, and under article 19, paragraph 3, of the Covenant the protection of "public order" as well as the protection of "national security" is a legitimate ground to restrict the exercise of the right to freedom of expression.

(Signed) Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 590/1994, Bennett v. Jamaica
(Views adopted on 25 March 1999, sixty-fifth session)*

Submitted by:	Trevor Bennett (represented by the London law firm of Clifford Chance)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	22 July 1994
Date of decision on admissibility:	22 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Having concluded its consideration of communication No. 590/1994 submitted to the Human Rights Committee by Mr. Trevor Bennett under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Trevor Bennett, a Jamaican citizen, at the time of submission of the communication awaiting execution at the St. Catherine District Prison, Jamaica. The author claims to be the victim of a violation by Jamaica of articles 6, 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by the London law firm of Clifford Chance. The author's death sentence was commuted to life imprisonment on 11 July 1995.

The facts as submitted by the author

2.1 The author was arrested on 20 November 1987 in connection with the murder, on 14 November 1987, of Mr. Derrick Hugh, a former acting Registrar of the Supreme Court and Resident Magistrate. On 15 December 1987, an identification parade was held, during which the author was represented by a lawyer provided by his family. Following a positive identification, the author was formally charged with

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Mr. Hugh's murder. On 13 April 1989, the author was convicted and sentenced to death in the Home Circuit Court of Kingston, Jamaica. The Court of Appeal of Jamaica refused the author's application for leave to appeal on 15 July 1991. His application for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 1 April 1993. With this, it is submitted, all available domestic remedies have been exhausted.

2.2 At trial, the case for the prosecution was that the author was one of two men who had unlawfully entered the house of Mr. Hugh on 14 November 1987. The prosecution did not allege that the author had fired the fatal shot, but that he was there as part of a plan in which he was aware that a gun was going to be used.

2.3 One David Whilby, an occupant of Mr. Hugh's house, testified that, on 14 November 1987, at about 3 a.m., he was awakened by two masked gunmen, who forced him to go to Mr. Hugh's room. The witness stated that one of the men then brought Mr. Hugh to a room downstairs, while the author remained with him and Mr. Hugh's mother. The witness further claimed that the author's mask slipped from his face, thus giving him the opportunity to observe it. When the author heard the shots being fired downstairs, he reportedly fled in panic. Mr. Whilby subsequently pointed out the author at the identification parade on 15 December 1987.

2.4 A second prosecution witness, the deceased's sister, gave evidence that she had heard a noise coming from a room, which had caused her to open the door, and that she had seen a man with a gun holding her brother. She herself was shot in her knee and she heard two shots being fired at her brother.

2.5 Evidence was also given to the effect that fingerprints found on some glass matched with the author's fingerprints.

2.6 The prosecution further relied on a caution statement given by the author on 21 November 1987. In this statement, the author claimed that by chance he had met an acquaintance, one Lukie, on the night of Friday 13 November when he was returning from a party. He complained to Lukie that he did not have any money to buy food for his baby, because he had not been paid yet by his employer. Lukie told the author that he knew where he could get some money and the author decided to go with Lukie, despite the fact that Lukie told him he had a gun.

2.7 The author admitted in his caution statement that he assisted Lukie to break into the house, where they found a sleeping man, Mr. Whilby. According to the author's statement, Lukie asked the man for money but was told that the money was in the next room. Lukie then took Mr. Whilby to the next room, the author following, where they found another man, Mr. Hugh. Lukie then reportedly pushed both men to the floor and asked Mr. Hugh: "Wey de book?". Mr. Hugh's mother came upstairs into the room. According to the author, Lukie then took Mr. Hugh downstairs, following which he heard shots, and saw Lukie running out of the house. The author also ran out, met Lukie at the back of the house and received from him some money stolen from the Registrar.

2.8 In his caution statement, the author stated that he went to sleep at his aunt's house and, the next morning, heard on the radio that the Registrar of the Supreme Court had been shot dead at his home. The author then heard that the police was looking for him and ran away. A week later, he gave himself up to the police.

2.9 Counsel for the author argued that the caution statement should not be admitted as evidence, because it had been made under coercion. A voir dire was held, during which several witnesses, among whom the investigating police officers and members of the author's family, testified. The author gave sworn evidence regarding the circumstances of his arrest. He claimed that, after having learned that members of his family had been taken into police custody on 19 November 1987, he had gone voluntarily to the Central Police Station in the company of a priest on the following day. On 21 November 1987, he made a statement under caution to the police, because he had been told that his family would not be released until he had made the statement. After the voir dire, the judge ruled the statement to be admissible.

2.10 At trial, the author made an unsworn statement from the dock, admitting that he had been at the scene of the crime, but claiming that he had been forced to attend. The author stated that he had previously told on Lukie concerning a robbery and that, when he met Lukie that night, Lukie had threatened to kill him for this. The author stated that Lukie and his gang then "decided that they were going for something and that I must participate in it". According to the author's unsworn statement, he asked who occupied the house but received no reply. Lukie broke into the house and "they told me to go in there too to follow Lukie".

2.11 The author admitted in his unsworn statement that, once he and Lukie were inside the house, what he saw "did not look like a robbery". The author stated that he heard Lukie ask the Registrar for his passport and tell the Registrar's mother that they were getting paid to kill her son.

The complaint

3.1 Counsel claims that the author was kept in detention in violation of article 9 of the Covenant, since he was not charged until 16 December 1987, that is four weeks after his arrest, nor was he brought before a judge during that period.

3.2 Counsel submits that the author did not have sufficient time and facilities to prepare his defence, in violation of article 14, paragraph 3 (b). In this context, counsel submits that the author was represented by different lawyers at various stages of the proceedings. The author further claims that he met the lawyer who represented him at the preliminary hearing only once before the hearing and that he met the two legal aid lawyers who represented him at his trial only twice before.

3.3 Counsel submits that the trial judge's instructions with respect to the issues of duress and joint enterprise, as well as his comments on the decision of the author to give an unsworn statement, amounted to a denial of justice, since they gave the jury the impression that the judge thought that the author was guilty.

3.4 As regards his appeal, the author submits that he had asked a Mr. Phipps to represent him and, reportedly, on 8 May 1991, he received confirmation that this lawyer was willing to look into the case. However, on 21 June 1991, the author was visited by a different lawyer who had been assigned by the legal aid authorities. It was this counsel who represented the author at his appeal. It is submitted that the author's appeal counsel spent only about ten minutes with the author prior to the appeal, on 21 June 1991. The author states that counsel told him that he saw no merit in his case. At the appeal hearing, counsel argued the appeal on the ground that the burden and standard of proof had not been properly explained to the jury and that the directions concerning duress had been improper. When the Court enquired whether counsel had any submissions to make concerning the trial judge's instructions relating to common design, counsel declined, since he considered the Crown's case overwhelming in this respect. It is argued that the above indicates that the author was not properly represented on appeal by a counsel of his own choosing, in violation of article 14, paragraph 3 (d).

3.5 Counsel also submits that the delay of four years between conviction and dismissal of petition for special leave to appeal, constitutes an undue delay in the judicial proceedings, in violation of article 14, paragraph 3 (c), of the Covenant.

3.6 Counsel further submits that the author has been held on death row since 13 April 1989 and alleges that his lengthy stay on death row, as well as his possible execution after such delay, is contrary to article 7 of the Covenant. In this context, reference is made inter alia to the judgment of the Privy Council in Earl Pratt & Ivan Morgan v. the Attorney General for Jamaica, delivered on 2 November 1993.

3.7 Counsel finally claims that the author's conditions of detention are inhuman and degrading and constitute a violation of article 10 of the Covenant. In this context, he points out that some of the author's co-prisoners are mentally ill and have, on occasion, attacked fellow inmates. He also submits that the prison conditions are insanitary. The author further states that his physical condition has deteriorated since he was detained and that he has developed an ulcer. In this context, he claims that he has not seen a doctor since 1990. To support his claim, counsel refers to two reports on the conditions in St. Catherine District Prison[4] and to a statement from the Prison Chaplain which reads:

> "The conditions in the prison are generally deplorable as is clearly stated in the recently published Wolfe report. A large pipe, carrying waste water from the story above, three yards from his cell, gives off a foul and pervasive odour ...
>
> ... He states that he has not seen a doctor since 1990 and has been "treating" his ulcer on his own. In fact the prison does not have a doctor, even on call."

3.8 It is stated that the same matter has not been submitted to another instance of international investigation or settlement.

State party's observations and author's comments thereon

4.1 By submission of 10 February 1995, the State party offered comments on the merits, in order to expedite the examination of the communication.

4.2 With respect to the alleged violations of article 14, paragraph 1, of the Covenant, the State party stated that these issues relate to the trial judge's directions to the jury and are therefore matters which, according to the Committee's own jurisprudence, ought to be left to appellate courts.

4.3 As to the author's claim that article 14, paragraph 3 (d), was violated because of the decision of the author's counsel to abandon the appeal, the State party alleged that it cannot be held responsible for the manner in which counsel conducts a case, once it has appointed a competent legal aid counsel. The State party however submitted that inquiries would be made into the circumstances under which the author's request for a particular counsel was not met.

4.4 The State party contested that the author's detention on death row for more than five years automatically amounts to cruel, inhuman and degrading treatment, and argued that the individual circumstances of each case should be examined before such a determination can be made.

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[4] Amnesty International report of December 1993 and report of the Government-appointed Task Force on Correctional Services (Ministry of Public Services) of March 1989.

4.5 With respect to the allegation that the author's conditions of detention violate articles 7 and 10, paragraph 1, of the Covenant, the State party acknowledged that there are difficulties in the correctional system, but did not accept the assertion that the standards are so low as to constitute a violation of the Covenant. In this context, the State party referred to the most recent report on Jamaican prisons done by the Inter-American Commission on Human Rights following an on-site visit, which reportedly does not contain anything supporting the author's allegations.

5. In his comments on the State party's submission, counsel limited himself to the admissibility of the communication. He explained that the author has not applied to the Supreme (Constitutional) Court for redress, since this remedy would have been ineffective and, moreover, not available for the author, because of his lack of funds, the absence of legal aid for the purpose and because of the unwillingness of Jamaican lawyers to represent applicants on a pro bono basis. It was therefore submitted that all domestic remedies have been exhausted.

Committee's decision on admissibility

6.1 During its 56th session the Committee considered the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 The Committee noted that the State party did not raise any objections to the admissibility of the communication. The Committee nonetheless examined whether all of the author's allegations satisfied the admissibility criteria of the Optional Protocol.

6.4 The author claimed that he did not have sufficient time to prepare his defence, in violation of article 14, paragraph 3 (b), of the Covenant. The Committee noted, however, that the author met with his legal representative on several occasions before the beginning of the trial and that there was no indication that the author or his legal representative complained to the judge at the trial that they had not had sufficient time to prepare the defence. In these circumstances, the Committee considered that the allegation had not been substantiated, for purposes of admissibility. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.5 The Committee noted that part of the author's allegations relate to the instructions given by the judge to the jury. The Committee referred to its prior jurisprudence and reiterated that it is generally not for the Committee, but for the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, and that the Committee will not admit such claims, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee took note of the author's claim that the instructions in the instant case amounted to a denial of justice. The Committee also noted the Court of Appeal's review of the judge's instructions, and concluded that in the instant case the trial judge's instructions did not show such defects as to render them arbitrary or a denial of justice. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.6 With regard to the author's claim that he was not represented on appeal by a counsel of his choice, the Committee recalled that article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge. This part of the communication was therefore inadmissible, as incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol. With regard to the author's claim that he was not properly represented by his legal aid counsel on appeal, the Committee noted from the information before it that counsel did in fact consult with the author prior to the hearing of the appeal, and that at the hearing counsel did argue grounds for appeal. The Committee considered that it is not for the Committee to question counsel's professional judgment as to how to argue the appeal, unless it is manifest that his behaviour was incompatible with the interests of justice. The Committee found therefore that, in this respect, the author had no claim under article 2 of the Optional Protocol.

6.7 As to the author's claim that his prolonged detention on death row amounts to a violation of article 7 of the Covenant, the Committee referred to its prior jurisprudence,[5] and in particular to its Views in respect of communication No. 588/1994.[6] The jurisprudence of this Committee remains that the length of detention on death row alone does not entail a violation of article 7 of the Covenant in the absence of some further compelling circumstances. In the instant case, neither the author nor his counsel had substantiated any such circumstances. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.8 The Committee considered that the author's remaining claims, regarding the period of detention without having been brought before a judge, the period between conviction at first instance and the dismissal of his application for special leave to appeal to the Judicial Committee of the Privy Council, and the circumstances of detention to be sufficiently substantiated for purposes of admissibility, and that they should be examined on the merits.

State party's observations on the merits, counsel's comments thereon and further comments from the State party

7.1 By submission of 14 February 1997, the State party, with regard to article 9, paragraph 3, accepts that to detain the author for four weeks before charging him or taking him before a magistrate was longer than desirable.

7.2 With regard to the alleged violation of article 14, paragraph 3 (c), on the ground of a delay of four years between the conviction and the dismissal of special leave to petition the Privy Council, the State party notes that "when broken down there was a delay of two years and three months between conviction and appeal and a delay of one year and nine months between the dismissal of the appeal and the dismissal of the application for special leave to appeal to the Privy Council". The State argues that although the period between the conviction and the hearing of the appeal was longer than desirable, it does not constitute a breach of the Covenant.

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[5] See the Committee's Views on communication Nos. 210/1986 and 225/1987 (Earl Pratt and Ivan Morgan v. Jamaica), adopted on 6 April 1989, paragraph 12.6. See also, inter alia, the Committee's Views on communications Nos. 270/1988 and 271/1988 (Randolph Barrett and Clyde Sutcliff v. Jamaica), adopted on 30 March 1992, and No. 470/1991 (Kindler v. Canada), adopted on 30 July 1993.

[6] Errol Johnson v. Jamaica, Views adopted on 22 March 1996.

7.3 With regard to the alleged violation of article 10, the State party states that it has investigated the author's claim that he has not seen a doctor since 1990 despite having an ulcer, but that it has not found any evidence to support these allegations. Therefore, the State party denies that there was a breach of the Covenant in this regard.

8. In his submission of 1 September 1998, counsel states that he has no observations in relation to the alleged violations of articles 10 and 14, paragraph 3 (c), and that his understanding of the reply to the alleged violation of article 9, paragraph 3, is that the State admits breach of the Covenant in this regard.

9. In its submission of 16 February 1999, the State party clarifies that its position with regard to the application of article 9, paragraph 3, in this case is that "detention of the applicant for four weeks was longer than desirable for either charging or carrying the applicant before a Magistrate, however, it does not constitute a breach of article 9(3)."

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information which has been made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 Article 9, paragraph 2, of the Covenant gives the right to anyone arrested to know the reasons for his arrest and to be promptly informed of any charges against him. Article 9, paragraph 3, gives anyone arrested or detained on a criminal charge the right to be brought promptly before a competent judicial authority. The author alleges to be a victim of violations of both provisions as he contends that he was neither charged nor brought before a magistrate until four weeks after his arrest.

10.3 With regard to the alleged violation of article 9, paragraph 2, the Committee notes that the author in his sworn statement at the trial explained both that he had turned himself in to the police and that he on the same night had been told by a named police officer that he was being questioned about "involvement in the slaying of Mr. Derrick Hugh". The Committee therefore finds that the facts do not disclose a violation of article 9, paragraph 2.

10.4 The Committee finds, however, that to detain the author for a period of four weeks before bringing him before a competent judicial authority constitutes a violation of article 9, paragraph 3, of the Covenant.

10.5 The author has claimed that the period of four years which lapsed from his conviction to the dismissal of his petition for special leave to appeal to the Judicial Committee of the Privy Council constitutes a breach of article 14, paragraph 3 (c). The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, particularly in capital cases, and notes, with regard to the period of two years and three months which lapsed from the conviction of the author to the dismissal of his appeal in the Court of Appeal, that the State party has acknowledged that such a delay is undesirable, but that it has not offered any further explanation. In the absence of any circumstances justifying the delay, the Committee finds that with regard to this period there has been a violation of article 14, paragraph 3 (c), in conjunction with paragraph 5.

10.6 However, with regard to the period of one year and nine months which lapsed from the judgment of the Court of Appeal to the dismissal of the author's petition for special leave to appeal to the Judicial Committee of the Privy Council in April 1993, the Committee notes that the author's petition was not lodged until December 1992, and consequently finds that there was no breach of the Covenant with regard to this period.

10.7 The author has claimed a violation of article 10, paragraph 1, both on the ground of the conditions of detention to which he is subjected at St. Catherine's District Prison and on the ground of lack of medical attention for an ulcer he allegedly sustained in 1990. To substantiate his claims, the author has invoked a report of March 1989 from the government appointed Task Force on Correctional Services, Amnesty International's report of December 1993, and a statement from the Prison Chaplain, based on his visit to the author on 25 May 1994. The State party has contested the allegations as to the general conditions of detention at St. Catherine's District Prison merely by invoking an unpublished report made by the Inter-American Commission on Human Rights after an on site visit which, allegedly, contains nothing to support the "terrible picture painted by the author's allegations". The State party has also disputed the author's allegation that he has an ulcer for which he has received no medical attention, as it states that it has investigated the matter without finding any evidence to support the allegations.

10.8 The Committee notes that the author refers not only to the inhuman and degrading prison conditions in general, but also makes specific allegations such as sharing a cell with mentally ill inmates, not having seen a doctor since 1990 and having close to his cell a large pipe carrying waste water with foul odour. The Committee notes that with regard to these specific allegations, the State party has merely disputed that the author was denied adequate medical attention. In the circumstances, the Committee finds that article 10, paragraph 1, has been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraph 3, article 10, paragraph 1 and article 14, paragraph 3 *(c) in conjunction with* paragraph 5, of the International Covenant on Civil and Political Rights.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Bennett with an effective remedy, including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

C. Communication No. 592/1994, Johnson v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by: Clive Johnson (represented by Mr. Saul Lehrfreund from Simons Muirhead and Burton)

Victim: The author

State party: Jamaica

Date of communication: 8 February 1994

Date of decision on admissibility: 14 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No. 592/1994 submitted to the Human Rights Committee by Mr. Clive Johnson, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Clive Johnson, a Jamaican citizen, at the time of submission of the communication awaiting execution in St. Catherine District Prison, Jamaica. Following the reclassification of his offence as non-capital, the author's death sentence was commuted to life imprisonment. He claims to be a victim of a violation by Jamaica of articles 6, 7, 10, 14 and 17 of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of Simons, Muirhead & Burton, a law firm in London, England.

The facts as submitted by the author

2.1 The author was arrested on 13 October 1985, in connection with the murder, on 11 October 1985, of one Clive Beckford. On 13 November 1987, on the second day of the trial before the Kingston Home Circuit Court, he was found guilty of murder and sentenced to death. The Court of Appeal, on 15 November 1988, dismissed his appeal. On 29 October 1992, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by Committee member David Kretzmer is appended to the present document.

2.2 The author has not applied to the Supreme Court for constitutional redress for the violations of his basic rights. The author argues that a constitutional motion is not available to him because of his lack of funds, the unavailability of legal aid and the unwillingness of Jamaican counsel to act on a pro bono basis.

2.3 The case for the prosecution was based on the evidence of a single eye-witness, R. H., a police constable. He stated that, in the early evening of 11 October 1985, he was walking towards his home with his 8-year-old daughter and Clive Beckford, who was 17 years old. Four men came running from behind and, after a brief conversation, encircled them. The men were holding ice picks and knives; two of them, among whom the author, attacked the witness, the other two attacked Beckford. After three or four minutes, Beckford ran off and was chased by his two attackers, who returned within a minute. After some more fighting, R. H. managed to get away and the men then released his daughter. R. H. and his daughter found Beckford lying in the road, stabbed and dying. Two days later, R. H. saw the author approaching him close to his home. He recognized him as one of the attackers. The author allegedly pulled out a knife and stabbed R. H., who then shot him in the leg.

2.4 At the trial, the author made an unsworn statement from the dock in which he denied having been at the scene of the incident on 11 October 1985. No witnesses were called on his behalf.

The complaint

3.1 The author submits that he was born on 21 August 1968 and therefore 17 years and seven weeks old at the time of the incident on 11 October 1985. In support, he furnishes an authenticated copy of his birth certificate. He claims that the death sentence was passed against him in violation of article 6, paragraph 5, of the Covenant.

3.2 The author claims that he has not received a fair trial within the meaning of article 14, paragraph 1, of the Covenant. He submits that the trial judge was wrong in directing the jury that they should apply an objective standard in determining the author's intention. The Court of Appeal agreed that this constituted a misdirection, but failed to remedy it, since it was of the opinion that it had not led to a substantial miscarriage of justice, because, in the opinion of the Court of Appeal, on a correct direction, the jury would inevitably have arrived at the same verdict. The author argues that the judge's instructions to the jury must meet particularly high standards in a case where capital punishment may be pronounced, and that the judge's failure to direct properly on the essential elements of the crime of murder render the trial unfair and the verdict uncertain.

3.3 The author argues that he was denied adequate legal representation both for the trial and on appeal. He emphasizes that he was held in custody for over 18 months before being granted access to a lawyer; that he was not represented at all at the preliminary hearing; that, when he finally was assigned a legal aid attorney, he only met her for the first time a few days before the trial; that this meeting lasted three minutes; that he only met his lawyer once during the trial itself. He also contends that he never met with his lawyer prior to the hearing of his appeal. The author contends that this constitutes a violation of his rights under article 14, paragraph 3 (b) and (d), to have adequate time and facilities for the preparation of his defence and to have adequate legal assistance assigned to him.

3.4 The author further argues that the State party's failure to grant him legal aid to pursue a constitutional motion amounts to a violation of article 14, paragraph 5, of the Covenant.

3.5 The author also claims that he has been subjected to ill-treatment on death row. In particular, he claims that, on 4 May 1993, during a search by soldiers, he was twice beaten on his testicles with a metal detector. Although the author consequently passed blood in his urine, he did not receive any medical treatment until 8 May 1993, when a doctor was sent by the Jamaica Council for Human Rights. The doctor examined the author and gave a prescription to the prison authorities, but the author never received the medication. It is submitted that this treatment amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant, read together with sections 25 (1) and 31 of the Standard Minimum Rules for Prisoners. Counsel for the author argues that no domestic remedies are available for this complaint and submits in this context that prisoners, including the author, who have complained about their treatment have received death threats from warders. He further claims that the Parliamentary Ombudsman's complaints procedure is ineffective. Reference is made to the Amnesty International report Jamaica - Proposal for an Enquiry into Deaths and Ill-Treatment of Prisoners in St. Catherine District Prison.

3.6 Counsel also contends that article 17, paragraph 1, of the Covenant has been violated in the author's case. He indicates that, on several occasions between 10 January 1991 and 18 June 1992, mail sent by the author never arrived at counsel's office because of unlawful interference by the prison authorities.

3.7 The author finally submits that he has been held on death row since 13 November 1987 and alleges that his lengthy stay on death row, as well as his possible execution after such delay, is contrary to article 7 of the Covenant. In this context, reference is made inter alia to the judgement of the Privy Council in Earl Pratt & Ivan Morgan v. the Attorney General for Jamaica, delivered on 2 November 1993.

State party's submission and counsel's comments

4.1 By submission of 25 January 1995, the State party raises no objection to the admissibility of the communication and addresses the merits of the case, in order to expedite its consideration.

4.2 The State party does not accept the author's view that, following the Privy Council's decision in Pratt and Morgan, a delay of over five years in carrying out the death penalty automatically constitutes cruel and inhuman treatment. The State party is of the opinion that each case must be looked at in its entirety and refers to the Committee's Views[7] in this respect.

4.3 The State party states that it is investigating the author's allegations that he was ill-treated while on death row, and that it will inform the Committee about the outcome of the investigations.

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[7] Pratt and Morgan v. Jamaica, communications Nos. 210/1986 and 225/1987, Views adopted on 6 April 1989.

4.4 The State party further states that it will investigate the author's allegation that he was denied access to an attorney during the 18 months in which he was held in custody.

4.5 As regards the absence of representation for the author at the preliminary hearing, the State party submits that he was free to seek legal aid. In the absence of any evidence that the State prevented the author from seeking his right, the State party denies that it was responsible for the author's failure to obtain representation. In this context, the State party states that it cannot be held accountable for the alleged failures in the conduct of the defence at trial or at appeal by a legal aid attorney, just like it cannot be held accountable for the conduct of privately retained counsel.

4.6 The State party further rejects the view that the decision by the Court of Appeal not to quash the judgement of the Court of first instance and not to order a retrial constitutes a violation of article 14, paragraph 1, of the Covenant. In this connection, the State party points out that the Court of Appeal examined the facts in the case, exercised its discretion in accordance with the law, and allowed the decision to stand. The State party refers to the Committee's jurisprudence that issues of facts and evidence are best left to appellate courts and argues that it is not within the Committee's competence to examine the way in which the Court of Appeal exercised its jurisdiction.

4.7 The State party denies that a violation of article 14, paragraph 5, took place. It submits that this article is confined to criminal offences, and that it is therefore the State party's obligation to ensure that anyone who is convicted of a crime is allowed to have the conviction and sentence reviewed by a higher tribunal. Since the Jamaican law provides for such a right, and the author exercised it, there is no violation of article 14, paragraph 5.

4.8 As to the author's allegation that he is a victim of a violation of article 17, the State party submits that there is absolutely no evidence of any arbitrary or unlawful interference with the author's mail.

5.1 In his comments on the State party's submission, counsel for the author agrees to the immediate examination by the Committee of the merits of the communication.

5.2 Counsel refers to several judicial decisions[8] in support of his argument that as the author has been incarcerated on death row since his conviction on 13 November 1987, for almost eight years, he has been subjected to inhuman and degrading treatment or punishment in violation of articles 7 and 10, paragraph 1, of the Covenant. In this connection, counsel quotes from the Privy Council judgement in Pratt & Morgan that a State "must accept the responsibility for ensuring that execution follows as swiftly as practical after sentence, allowing a reasonable time for appeal and consideration of reprieve".

5.3 Counsel also refers to the Committee's general comment on article 7,[9] where it is stated that "when the death penalty is applied by the State party ... it must be carried out in such a way as to cause the least possible physical pain and mental suffering". Counsel submits that any execution that would take place more than five years after conviction would undoubtedly result in pain and suffering and therefore constitute inhuman and degrading treatment.

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[8] Inter alia, Pratt & Morgan v. Attorney-General (1993) All ER 769, Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General, judgement No. SC73/93, 24 June 1993.

[9] General Comment No. 20, adopted at the Committee's forty-fourth session, on 7 April 1992.

5.4 As regards the State party's contention that it cannot be held accountable for failures of legal aid attorneys, counsel refers to the Committee's Views in communication No. 283/1988[10] where it held that: "In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial". It is submitted that, although the Committee has held that shortcomings of a privately retained counsel cannot be attributed to a State party, this does not apply to legal aid attorneys, who once assigned must provide "effective representation".

5.5 In a further letter dated 17 November 1995, counsel explains that the matter of Mr. Johnson's age was not raised at the trial because there was not enough time and facilities to prepare his defence. Only in October 1992, the Jamaica Council for Human Rights noticed his being under age. The lawyer who represented Mr. Johnson on appeal informed London counsel by letter of 29 March 1993 that, if the birth certificate were authentic, the matter could be brought again before the Court of Appeal. On 18 March 1994, the Jamaica Council for Human Rights sent London counsel an authenticated copy of the birth certificate. London counsel claims that it appears that the author's Jamaican appeal counsel was unwilling to assist in bringing the matter to the attention of the Jamaican authorities. From the copies of correspondence it appears that there has been no further contact with the Jamaican appeal counsel since March 1993.

Committee's decision on admissibility

6.1 At its 56th session, the Committee considered the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 The Committee noted that the State party had not raised any objections to the admissibility of the communication and had forwarded its comments on the merits in order to expedite the procedure, and that counsel for the author had agreed to the examination of the merits of the communication. Nevertheless, the Committee considered that the information before it was not sufficient to enable it to adopt its Views. The Committee therefore limited itself to issues of admissibility.

6.4 The Committee noted that part of the author's allegations related to the instructions given by the judge to the jury. The Committee referred to its prior jurisprudence and reiterated that it was generally not for the Committee, but for the appellate Courts of States parties, to review specific instructions to the jury by the trial judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice. The Committee took note of the author's claim that the instructions in the instant case did not meet the high standards required in cases of capital punishment. The Committee also noted the Court of Appeal's consideration of this claim, and concluded that in the instant case the trial judge's instructions did not show such defects as to render them arbitrary or a denial of justice. Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

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[10] Aston Little v. Jamaica, Views adopted on 1 November 1991, para. 8.3.

6.5 As to the author's claim that his prolonged detention on death row amounted to a violation of article 7 of the Covenant, the Committee noted that the State party had not objected to the admissibility of the claim. The Committee would therefore consider on the merits whether the author's prolonged detention on death row, in view of his young age, constituted a violation of article 7 of the Covenant.

6.6 The Committee noted that the author's claim that some of the letters sent by him in 1991 and 1992 failed to arrive at his counsel's office, lacked specificity and considered that the author had failed to substantiate, for purposes of admissibility, his claim that this was due to unlawful interference by the prison authorities, in violation of article 17 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.7 The Committee considered that the author's claims that he was sentenced to death in violation of article 6, paragraph 5, of the Covenant, that he had been subjected to ill-treatment in detention, that he had no access to a legal representative during the first 18 months of his detention and that he was not represented at the preliminary hearing, and that the unavailability of legal aid for constitutional motions constituted a violation of article 14 of the Covenant, had been sufficiently substantiated, for purposes of admissibility, and should be considered on the merits.

7. Accordingly, on 14 March 1996, the Human Rights Committee decided that the communication was admissible in so far as it might raise issues under articles 6, paragraph 5, 7, 10, paragraph 1, and 14, paragraphs 1, 3 (b) and (d), and 5, of the Covenant, in respect of the lack of legal representation during the first 18 months of detention, at the preliminary hearing and the unavailability of legal aid for the filing of a constitutional motion.

State party's observations and author's comments thereon

8.1 By note of 28 October 1996, the State party informs the Committee that an investigation has shown that there is no record of an injury report with respect to the beating of the author which allegedly occurred on 4 May 1993. Neither is there a record of any medical treatment or medication. According to the State party, the only record of the incident appears to be contained in the minutes of a meeting held between a representative of the Jamaica Council for Human Rights, a Superintendent and death row inmates. On two occasions attempts were made by a senior probation officer to interview the author, but he was hesitant to speak and indicated that he wished to obtain his attorney's approval before communicating with the interviewer. In the circumstances, the State party denies that a violation of articles 7 and 10(1) took place.

8.2 With regard to the lack of legal representation during pre-trial detention and at the preliminary hearing, the State party reiterates that the author was free to seek legal aid, and that unless it can be shown that such representation was requested and denied, no breach of the Covenant has occurred.

8.3 In respect of the absence of legal aid for constitutional motions, the State party argues that a constitutional motion is designed to seek constitutional redress, and is not an appellate procedure. According to the State party, its obligations under article 14, paragraph 5, concern the Court of Appeal procedures and the Privy Council. Its failure to provide legal aid for a constitutional remedy is said not to be in breach of article 14, paragraph 5.

8.4 The State party points out that the author's death sentence has been commuted, and that as a consequence there has been no breach of article 6, paragraph 5. In this context, the State party notes that section 29(1) of the Juveniles Act prohibits the execution of a person who was under eighteen at the time the offence was committed.

9.1 In his comments, counsel argues that the lack of records into the beating of 4 May 1993, does not negate the author's allegation. Counsel notes that the author gave a statement, on 14 May 1993, to an attorney, in which he set out the facts of the incident. The observations by the State party in no way disprove the allegation made by the author, and the lack of medical records is indeed consistent with the author's claim that he was denied medical treatment. In view of the risk for reprisals, counsel states that it is not surprising that the author was hesitant to speak to the officer sent to interview him.

9.2 Counsel submits that the author's claim under article 14(3)(b) does not only relate to the lack of legal representation before the trial, but also during his trial and appeal, issues not addressed by the State party. Counsel argues that it is the State party's duty to appoint legal aid attorneys in a timely fashion, so that they have sufficient time to prepare the defence for the trial and provide effective representation.

9.3 With regard to the lack of legal aid for constitutional motions, counsel argues that the State party has an obligation under article 2(3) of the Covenant to make the remedies in the constitutional court addressing violations of human rights available and effective. Counsel refers to the Committee's jurisprudence[11] and submits that the absence of legal aid has denied the author the opportunity to assess irregularities of his criminal trial, in violation of article 14(1) juncto article 2(3) of the Covenant. According to counsel, this is particularly pertinent in view of the author's young age.

9.4 Counsel submits that the author was born on 21 August 1968 and therefore seventeen years and seven weeks old at the time of the incident of 11 October 1985. As he was sentenced to death whilst under eighteen at the time when the offence was committed, article 6(5) has been violated. According to counsel, the violation occurred at the time the author was sentenced to death and continued until his sentence was commuted. The commutation may be a remedy for the violation, but does not mean that the violation did not occur.

9.5 In relation to the violation of article 6(5), counsel argues that the author's prolonged detention on death row amounted to a violation of articles 7 and 10(1) of the Covenant. With reference to the Committee's jurisprudence, it is submitted that the author having been sentenced to death in violation of article 6(5) of the Covenant is a compelling circumstance, over and above the length of detention on death row, that turns the author's detention into a violation of articles 7 and 10(1) of the Covenant.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

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[11] See Communication No. 377/1989 (Anthony Currie v. Jamaica), Views adopted on 29 March 1994.

10.2 With regard to the author's claim that article 14, paragraph 3(b) and (d) was violated in his case, the Committee affirms that legal assistance must be made available to an accused who is charged with a capital crime. This applies not only to the trial in the court of first instance, but also to any preliminary hearings relating to the case. In the instant case, the State party has not contested that the author was not represented during the preliminary hearing, but has merely stated that there is no indication that he had requested a lawyer. The Committee considers that, when the author appeared at the preliminary hearing without a legal representative, it would have been incumbent upon the investigating magistrate to inform the author of his right to have legal representation and to ensure legal representation for the author, if he so wished. The Committee therefore concludes that the absence of legal representation for the author at the preliminary hearing constituted a violation of article 14, paragraph 3(d), of the Covenant.

10.3 With regard to the author's death sentence, the Committee notes that the State party has not challenged the authenticity of the birth certificate presented by the author, and has not refuted that the author was under eighteen years of age when the crime for which he was convicted was committed. As a consequence, the imposition of the death sentence upon the author constituted a violation of article 6, paragraph 5, of the Covenant.

10.4 In the circumstances, since the author of this communication was sentenced to death in violation of article 6(5) of the Covenant, and the imposition of the death sentence upon him was thus void ab initio, his detention on death row constituted a violation of article 7 of the Covenant.

10.5 With regard to the author's claim that he was subjected to ill-treatment on 4 May 1993, the Committee notes that the author has given detailed information, and that the State party's investigation has not refuted the author's allegation. On the basis of the information before it, the Committee finds that the author's claim that he has been subjected to ill-treatment on 4 May 1993 has been substantiated and that there has been a violation of article 7 of the Covenant.

10.6 In the light of the Committee's other findings, the Committee need not address counsel's claim that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 6, paragraph 5, 7, and 14, paragraph 3(d), of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, Clive Johnson is entitled to an effective remedy. In view of the fact that the author was a minor when he was arrested and that he has spent almost thirteen years in detention, more than seven of which on death row, the Committee recommends the author's immediate release. The State party is under the obligation to ensure that similar violations do not occur in the future.

13. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and

to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by David Kretzmer
(concurring)

I concur in the view of the Committee that holding the author on death row in this case amounted to cruel and inhuman punishment. However, since the Committee has consistently held in the past that the time on death row does not of itself amount to a violation of article 7, I think is important to set out the grounds for the different result in this case.

The Committee's view that the mere length of time spent on death row by a person sentenced to death does not amount to cruel and inhuman punishment rests on the notion that holding otherwise would imply that a State party could avoid violating the Covenant by executing a condemned person. As the Covenant strongly suggests that abolition of the death penalty is desirable, the Committee could not accept an interpretation of the Covenant the implication of which was that the Covenant would be violated if a State party refrained from executing a person, but not if it executed him.

This view of the Committee obviously holds only when imposing and carrying out the death sentence are not of themselves a violation of the Covenant. The logic behind the view does not apply when the State party would violate the Covenant by imposing and carrying out the death sentence. In such a case the violation involved in imposing the death penalty is compounded by holding the condemned person on death row, during which time he suffers from the anxiety over his pending execution. This detention on death row may certainly amount to cruel and inhuman punishment, especially when that detention lasts longer than necessary for the domestic legal proceedings required to correct the error involved in imposing the death sentence.

In the present case, as the Committee has held in paragraph 10.4, imposition of the death penalty was inconsistent with the State party's obligation under article 6, paragraph 5 of the Covenant. The author subsequently spent almost eight years on death row, before his sentence was commuted to life imprisonment following reclassification of his offence as non-capital. In these circumstances the detention of the author on death row amounted to cruel and inhuman punishment, in violation of article 7 of the Covenant.

[Signed] D. Kretzmer

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 594/1992, Phillip v. Trinidad and Tobago (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Irving Phillip (represented by Ms. Natalia Schiffrin, of Interights
Victim:	The author
State party:	Trinidad and Tobago
Date of communication:	13 February 1994 (initial submission)
Date of decision on admissibility:	15 March 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No.594/1992 submitted to the Human Rights Committee by Mr. Irving Phillip, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Irvin Phillip, a Trinidadian citizen serving a life sentence at the State Prison of Port-of-Spain, Trinidad and Tobago. He claims to be a victim of a violation of articles 7, 10 (1) and 14 (1), 14 (3) (b), (d) and (e) of the International Covenant on Civil and Political Rights by Trinidad and Tobago. He is represented by Ms. Natalia Schiffrin of Interights.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the rules of procedure, Mr. Rajsoomer Lallah did not participate in the adoption of the Views.

The facts as submitted

2.1 The author, together with Peter Holder[12] and Errol Janet, was jointly charged with the murder, on 29 March 1985, of one Faith Phillip (no relation to the author). On 5 May 1988, after a trial which lasted one month, the jury failed to return a unanimous verdict, and a retrial was ordered. On 18 June 1988, the accused were found guilty as charged and sentenced to death by the Second Assizes Court of Port-of-Spain. On 5 April 1990, the Court of Appeal of Trinidad and Tobago dismissed the appeal of Messrs. Holder and Phillip, whereas it acquitted Errol Janet; it issued a written judgement two weeks later. Mr. Phillip's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 24 April 1991. On 31 December 1993 Mr. Phillip's death sentence was commuted to life imprisonment.

2.2 The subject of the communication is Mr. Phillip's second trial, at which the Court denied the legal aid attorney's motion for an adjournment in order to better prepare for the defence or, in the alternative, to allow Mr. Phillip to engage other counsel.

2.3 Ms. Zelina Mohammed, a cashier at the Zodiac Recreational Club in Port-of-Spain was the sole eye witness to the crime and the prosecution's main witness. At trial she testified that, on the morning of 29 March 1985, she was at work, inside the bar, and that Faith Phillip sat in front of the bar, when three men came in. Mr. Holder ordered a drink and after a while went downstairs; she heard a sound as if the gate to the entrance was being closed. When Mr. Holder came back, she asked Faith Phillip, to have a look. Shortly thereafter Mr. Phillip assaulted Faith Phillip, while Mr. Holder kicked open the door to the bar and entered the bar together with Mr. Janet. Both were holding knives. Mr. Holder forced Ms. Mohammed to open the cash register and give them $300. She was also forced to show them the room of the Club's owner which was at the back. There, Mr. Holder tied her up, while Mr. Janet searched the room for valuables. She was told to face the wall, but before doing so she saw Mr. Phillip in the corridor, pulling Faith Phillip into another room. She then heard fighting, which continued for about five minutes. After it stopped she heard footsteps, as if the accused were leaving. Finally, she was untied by the Club's electrician who passed by and they found Faith Phillip lying on the floor, with her face swollen and blood running from her nose. The deceased was pronounced dead on arrival to hospital. The cause of death was a massive brain haemorrhage, resulting from blunt force injuries to her head.

2.4 At the identification parade held on 4 April 1985 Ms. Mohammed selected Mr. Phillip from a group of eight men as someone who "looked like" one of the persons involved in the crime. Mr. Phillip claims mistaken identification.

2.5 At the trial, Mr. Holder gave sworn testimony admitting participation in the robbery. He denied, however, having struck the deceased. He stated that while he and Mr. Janet were emptying the drawers in the Club owner's room, he saw Mr. Phillip going up the corridor with Faith Phillip. When they left the building, they met Mr. Phillip outside.

2.6 The prosecution stated that all three defendants made statements under caution, witnessed by a justice of the peace, admitting their involvement in the crime. In his statement the author admitted the robbery but denied taking any part in the beating of the deceased. At trial, however, he gave sworn testimony denying knowledge of the crime, claiming that he had never left his home on 29 March 1985 and challenging the identification by Ms. Mohammed. His statement to the police was admitted into evidence after a voir dire.

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[12] Communication No. 515/1992, declared inadmissible on 19 July 1995 because of non-exhaustion of domestic remedies.

2.7 Mr. Janet affirmed upon oath his previous statement to the police. He stated that the robbery was planned by Messrs. Holder and Phillip, who had received information that the owner of the Club kept all his money at the Club. Out of fear of both men, he assisted in the robbery. He further stated that he prevented Mr. Holder from further hitting the deceased.

The complaint

3.1 The author claims that his trial was unfair in breach of article 14, paragraph 1, of the Covenant. In this context he complains about the inconsistency in the testimony of witnesses during the first trial. He points out that, as the prosecution failed to prove his guilt at the first trial, he should have been acquitted. The author further claims that, as the prosecution had failed to prove his mens rea, the judge should have brought the issue of manslaughter to the attention of the jury.

3.2 With respect to the time and facilities to prepare his defence in the retrial, the author claims that counsel was appointed on Friday 10 June 1988 and that the trial commenced on Monday 13 June 1988. Counsel's request for additional time to prepare the defence and to meet with Mr. Phillip was denied, in violation of article 14, paragraphs 3 (b) and (e) of the Covenant.

3.3 He further complains that he was denied a counsel of his choosing at the retrial, in violation of article 14, paragraph 3 (d). It appears from the notes of evidence that during the retrial the author complained about the performance of his counsel who was young and had never defended a capital case. Accordingly the author requested an adjournment to obtain a counsel of his own choice. The judge advised counsel to make his application to withdraw from the case in court. The court subsequently refused counsel's application. The author states that the judge told him that he could not afford an attorney of his own choice and that therefore the case would not be postponed. According to the author, his conviction is attributable to the judge's tyrannical behaviour in addition to the inexperience of counsel.

3.4 With respect to the conditions under which Mr. Phillip is detained, counsel argues that the prison cell is underground, filthy, with bad ventilation and infested with cockroaches and rats. He sleeps on pieces of carpet and torn cardboard box on the cold concrete floor without any bedding. Food is inadequate. There are no toiletries or medication. The complaints, however, have not been reported to any authorities, because the author fears reprisal from the warders and claims to be living in complete fear for his life. These conditions are said to constitute violations of articles 7 and 10 (1) of the Covenant.

State party's observations and author's comments

4.1 In its submission of 23 September 1993 the State party objects to the admissibility of the communication and refers, in particular, to the Committee's jurisprudence according to which the evaluation of facts and evidence is for the Courts of States parties.

4.2 It further informs the Committee that on 23 August 1993, Irvin Phillip filed a constitutional motion in the High Court in which he is seeking a declaration that the execution of the sentence of death on him will be unconstitutional, null and void as well as an order vacating the sentence of death and staying the execution. On 23 August 1993, the Court granted a conservatory order directing the State to undertake that no action would be taken to carry out the sentence of death on the author until the hearing and determination of the motion.

4.3 Moreover, the State party argues:

(a) The author has not indicated the provision or provisions of the Covenant on Civil and Political Rights which he alleges have been violated by the Republic of Trinidad and Tobago; and

(b) The facts as submitted do not raise issues under any of the provisions of the Covenant;

(c) According to the constant jurisprudence of the Human Rights Committee, it is in principle not for the Committee but for the Courts of States Parties to the Covenant to evaluate facts and evidence in a particular case. The decision of the courts in Trinidad and Tobago and the Privy Council in this case cannot be viewed as being arbitrary or as amounting to a denial of justice;

(d) By reasons of the foregoing, the communication is incompatible with the provisions of the Covenant.

4.4 In its submission of 9 February 1995, the State party informs the Committee that pursuant to the judgment of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. the Attorney General of Jamaica, the sentences of death against Messrs. Peter Holder and Irvin Phillip were commuted to sentences of life imprisonment.

5.1 By letter of 21 June 1994, Interights, a non-governmental organization in the United Kingdom informed the Committee that it had been asked by Mr. Phillip to represent him before the Committee.

5.2 By letter of 27 March 1995 Interights resubmitted the communication on behalf of Mr. Phillip, enclosing the text of the notes of evidence and the transcript of the trial before the Second Assize Court in Port-of-Spain against Messrs. Peter Holder, Irvin Phillip and Errol Janet.

Committee's decision on admissibility

6.1 During its 56th session the Committee considered the admissibility of the communication.

6.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 As to the requirement in article 5, paragraph 2 (b), of the Optional Protocol that domestic remedies be exhausted, the Committee noted that the Privy Council had dismissed the author's application for leave to appeal. Therefore, with regard to the author's allegations of unfair trial, the Committee was satisfied that domestic remedies had been exhausted for purposes of the Optional Protocol. In this connection, the Committee also noted that, following the commutation of the author's death sentence, the author's constitutional motion before the High Court had become moot.

6.4 As regards the author's claim that the conditions of his detention were cruel, inhuman and degrading, the Committee noted that the State party had so far not attempted to refute his claim nor had it provided information about effective domestic remedies available to the author. In these circumstances, given the author's statement that he had not filed a complaint because of his fears of the warders, the Committee considered that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the complaint, which might raise issues under articles 7 and 10 of the Covenant.

6.5 With regard to that part of the author's communication relating to the evaluation of evidence and to the instructions given by the judge to the jury, in particular, the failure to instruct the jury on the possibility of manslaughter, the Committee referred to its established jurisprudence that it was, in principle, for the appellate courts of States parties to the Covenant, and not for the Committee, to evaluate facts and evidence in a particular case. As to the author's allegation that he had not made any admission to the police and that the identification by the main prosecution witness was faulty, the Committee noted that these matters were the subject of a voir dire, at which the facts and evidence were evaluated. Similarly, it was not for the Committee to review specific instructions to the jury by the judge, unless it could be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee did not reflect that the trial judge's instructions or the conduct of the trial suffered from such defects. This part of the communication was therefore inadmissible under article 3 of the Optional Protocol.

6.6 As to the other claims under article 14, paragraph 3, the Committee found that the author had substantiated, for purposes of admissibility, his allegations that at the retrial he did not have sufficient time and facilities to prepare his defence, that his defence counsel was inexperienced and that he was denied the opportunity to obtain counsel of his own choosing. The Committee considered that it should examine this part of the communication on the merits.

6.7 Consequently, on 15 March 1996, the Human Rights Committee declared the communication admissible in as much as it appeared to raise issues under articles 7, 10, and 14, of the Covenant.

Issues and proceedings before the Committee

7.1 The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern that, following the transmittal of the Committee's decision on admissibility, no further information has been received from the State party clarifying the matters raised by the present communication despite reminders sent on 11 March 1997, 30 April and 12 May 1998. The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol, that a State party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. In light of the failure of the State party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that these have been substantiated.

7.2 The Committee notes that the information before it shows that the author's counsel requested the court to allow him an adjournment or to withdraw from the case, because he was unprepared to defend it, since he had been assigned the case on Friday 10 June 1988 and the trial began on Monday 13 June 1988. The judge refused to grant the request allegedly because he felt the author would be unable to afford counsel of his own choice. The Committee recalls that while article 14, paragraph 3(d), does not entitle the accused to choose counsel provided to him free of charge, the Court should ensure that the conduct of the trial by the lawyer is not incompatible with the interests of justice. The Committee considers that in a capital case, when counsel for the accused who was not experienced in such cases requests an adjournment because he is unprepared to proceed the Court must ensure that the accused is given an opportunity to prepare his defence. The Committee is of the opinion that in the instant case, Mr. Phillip's counsel should have been granted an adjournment. In the circumstances, the Committee finds that Mr. Phillip was not effectively represented on trial, in violation of article 14, paragraph 3 (b) and (d), of the Covenant.

7.3 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not respected constitutes, if no further appeal against conviction is possible, a violation of article 6 of the Covenant. As the Committee noted in its General Comment 6 [16], the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that " procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review of conviction and sentence by a higher tribunal". In this case, since the final sentence of death was passed without due respect for the requirements of article 14, the Committee must hold that there has also been a violation of article 6 of the Covenant.

7.4 The Committee notes that with regard to the author's conditions of detention he has made precise allegations, of being kept in a filthy, badly ventilated, cockroach and rat infested, underground cell. He sleeps on pieces of carpet and torn cardboard box on cold concrete floor, with no bedding. Food is inadequate and there are no toiletries or medication. The State party has made no attempt to refute these specific allegations. In the circumstances and in the absence of a response from the State party, the Committee takes the allegations as undisputed. It finds that holding a prisoner in the above conditions of detention violates his right to be treated with humanity and with respect for the inherent dignity of the human person, and is therefore contrary to article 10, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 10, paragraph 1, and 14, paragraph 3 (b) and (d), and consequently of article 6 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Phillip with an effective remedy, including immediate release and compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. Bearing in mind that by becoming a State party to the Optional Protocol, Trinidad and Tobago has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 602/1994, Hoofdman v. the Netherlands (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Cornelis Hoofdman (represented by Mr. L. J. L. Heukels, a lawyer in Haarlem)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	26 May 1994
Date of decision on admissibility:	3 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No. 602/1994 submitted to the Human Rights Committee by Cornelis Hoofdman, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Cornelis P. Hoofdman, a citizen of the Netherlands born in 1952. He claims to be a victim of violations by the Netherlands of article 26 of the International Covenant on Civil and Political Rights, as well as of his right to respect for his private and family life, and his right to a fair hearing, as protected by articles 6, paragraph 1, and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He is represented by Mr. L. J. L. Heukels, a lawyer in Haarlem.

Facts as submitted by the author

2.1 The author and his girlfriend, lived together as an unmarried couple from January 1986 until her death, on 14 February 1991. On 26 February 1991, the author applied for a pension or temporary benefit under the General Widows' and Orphans' Act (Algemene Weduwen- en Wezenwet) (AWW). On 26 April 1991, the Social Security Bank (Sociale Verzekeringsbank) (SVB), which is responsible for implementing the AWW, rejected the author's application on the ground that, since he had not been married, he did not meet AWW requirements. The decision was based on articles 8 and 13 of the Act, under which pension entitlements or temporary benefits are only awarded to the widow or the widower of the (insured) spouse.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdalla Zakhia. The text of an individual opinion by Committee member Elizabeth Evatt is appended to the present document.

2.2 On 12 May 1991, the author appealed to the Board of Appeal (Raad van Beroep), arguing that the distinction drawn by the SVB between married and unmarried cohabitants, for purposes of AWW benefits, amounted to prohibited discrimination within the meaning of article 26 of the Covenant. The President of the Board of Appeal, on 2 December 1991, declared the appeal unfounded, relying on a decision taken on 28 February 1990 by the highest court in social security cases, the Central Board of Appeal (Centrale Raad van Beroep) (CRvB), in a case similar to that of the author.

2.3 In that decision (also concerning the AWW), the CRvB pointed out that, further to the Committee's Views on communication No. 180/1984 (Danning v. the Netherlands),[13] it had already decided, in cases concerning the Sickness Benefits Act, that differentiation between married and unmarried cohabitants under Netherlands social security legislation did not amount to prohibited discrimination within the meaning of article 26 of the Covenant. According to the CRvB, the social conditions and views in the field of marriage and cohabitation prevailing at the time in question (1987) had not changed in such a way as to conclude that the restriction laid down in the AWW violated article 26 of the Covenant. In this connection, the CRvB noted that the fact that the legislature, in the light of the recent revision of the social security system, had introduced the principle of equality of treatment of married and unmarried couples who shared a household, did not necessarily mean that the restriction still maintained under the AWW (i.e., that only the widower or widow of the insured spouse was entitled to a pension or temporary benefits) amounted to a prohibited differentiation under article 26 of the Covenant. The CRvB added that, even though discrimination did not arise, the Dutch Government remained, of course, free to strive for the equal treatment of married and unmarried cohabitants.

2.4 On 24 December 1991, the author filed an appeal against the decision of 2 December 1991 with the full Board of Appeal He argued that the CRvB's findings in the other case were based on the social conditions and views in the field of marriage and cohabitation prevailing in 1987, and that the CRvB had not excluded that those conditions and views could be subject to changes within a short period of time, as a result of which the denial of AWW benefits to unmarried cohabitants would amount to prohibited discrimination within the meaning of article 26 of the Covenant. The author pointed out that the relevant time in question in his case was 14 February 1991, when his girlfriend died; he contended that at that date changes had occurred in the conditions and views held in society in respect of marriage and cohabitation.

2.5 In this connection, the author referred to the following passages of the Explanatory Memorandum to the proposed new General (Bereaved) Relatives' Act (Algemene Nabestaanden Wet) (ANW), which was discussed in the Lower House in 1990-1991:

- "The General Widows' and Orphans' Act is subject to revision. The changes that have occurred in society since the entering into force [of the Act] in 1959 justify this conclusion";

- "A third reason for revising the AWW is the wish to secure the equal treatment of married and unmarried cohabitants. Through revision of the AWW, shape should be given to the [...] objective not to differentiate between forms of cohabitation";

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[13] Views adopted on 9 April 1987, at the Committee's twenty-ninth session.

- "[...] If equal treatment of married and unmarried cohabitants cannot be realized in the ANW, it will result in an incongruity within the social security system. If the ANW is to be excluded, unjustifiable situations could arise. From that perspective, also, the Government considers that the equal treatment of married and unmarried cohabitants under the ANW is necessary."

According to the author, the drafting of the ANW and the view of the Government as laid down in the Explanatory Memorandum to that Act indicated that conditions and views in the field of marriage and cohabitation held in society in 1991 were different from those that prevailed in 1987.

2.6 On 26 May 1992, the Board of Appeal rejected the author's appeal, referring to a judgment of 16 October 1991 of the Central Board of Appeal; in that case, the CRvB had decided that, in October 1991, the restriction in the AWW under which only the widow or widower was entitled to AWW benefits did not yet amount to prohibited discrimination within the meaning of article 26 of the Covenant. The Board of Appeal concluded that, accordingly, the same could be said for the author's case, and that the proposals under the ANW did not make any difference.

2.7 On 29 June 1992, the author appealed to the Central Board of Appeal. He argued that, according to the CRvB's own jurisprudence, the date of decease of the partner with whom the applicant lived together is relevant to the question of whether the difference of treatment under the AWW between married people and unmarried cohabitants constituted prohibited discrimination within the meaning of article 26 of the Covenant; the question of whether the conditions and views held in society in the field of marriage and cohabitation have changed should thus be assessed as of that moment. The author pointed out that the CRvB's judgment of 16 October 1991 concerned a request for AWW benefits of an applicant whose partner had died on 6 February 1988; he contended that, while in 1988 one could still have doubts as to whether relevant changes had occurred in social conditions and views, one could not question this in 1991, since, at that time, the proposed ANW, with its principle of equal treatment of married and unmarried cohabitants, had been placed before the Lower House; the fact that the ANW had not yet entered into force did not make a difference.

2.8 On 17 June 1993, the Central Board of Appeal confirmed the Board of Appeal's judgment of 26 May 1992. It referred to its earlier jurisprudence (including a judgment of 24 May 1993) on the matter and pointed out that it had already ruled that it was for the legislature to outline which categories of cohabitants were entitled to pensions or benefits after the death of the partner, and that it did not consider it expedient to interfere with the proposed legislation (i.e., the ANW). With this, it is submitted, all domestic remedies have been exhausted.

Complaint

3.1 The author claims that his private and family life has not been respected because he was denied AWW benefits simply because he was not married. He points out that under several other social security acts, unmarried cohabitants are treated as married cohabitants, and that he and his partner fulfilled the criteria used in respect of these acts (joint accommodation and joint contribution to the household costs). In this context, he submits that both he and his partner were unemployed and received unemployment benefits as a "married couple" under the relevant act. However, in order to receive benefits under the AWW, he would have been forced to marry first; according to the author, such an artificial construction constitutes arbitrary interference with his private life.

3.2 The author refers to the grounds he argued before the Board of Appeal and Central Board of Appeal; he reiterates that conditions and views held in society as to marriage and cohabitation have changed, and claims that the unequal treatment under the AWW of married couples and unmarried couples who share a household amounts to prohibited discrimination within the meaning of article 26 of the Covenant.

3.3 The author further argues that he did not receive a fair hearing with regard to the determination of his right to a pension benefit, because the law applied was discriminatory.

3.4 It is submitted that the same matter has not been submitted to the European Commission of Human Rights.

State party's observations and author's comments thereon

4. The State party, by submission of 30 August 1995, raises no objections to the admissibility of the author's claim under article 26 of the Covenant. With regard to his claims under articles 6 and 8 of the European Convention, however, the State party notes that these claims concern another convention than the Covenant, and, moreover, that the author has not submitted these claims to the Dutch courts. The State party concludes therefore that this part of the communication is inadmissible.

5. In his comments on the State party's submission, the author states that his claims under articles 6 and 8 of the European Convention are to be seen in conjunction with his claim under article 26 of the Covenant, and should therefore be considered admissible.

Committee's decision on admissibility

6.1 At its 57th session, the Committee considered the admissibility of the communication. It noted that the State party had raised no objections to the admissibility of the author's claim under article 26 of the Covenant. The Committee considered that the question whether or not the difference in treatment of the author, as a consequence of his marital status, was unreasonable or arbitrary, should be examined on the merits, in the context of the State party's obligations under article 26 in conjunction with article 23, paragraph 1, of the Covenant. It invited the State party to explain the basis of the differentiation, as well as the different obligations and benefits under the law for married and unmarried couples at the material time.

6.2 The Committee noted the State party's objections to the admissibility of the author's claims of unfair hearing and interference with private and family life. The Committee observed, however, that articles 6, paragraph 1, and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms were similar in contents to articles 14, paragraph 1, and 17 of the Covenant. The Committee recalled that, whereas authors must invoke the substantive rights contained in the Covenant, they were not required, for purposes of the Optional Protocol, necessarily to do so by reference to specific articles of the Covenant.

6.3 The author had claimed that the difference in treatment between married and unmarried couples under the AWW constituted a violation of his right to respect for his private and family life. The Committee noted that the information before it showed that the State party at no time interfered with the author's decision to cohabit with his girlfriend without marrying her, and that the author was free to marry or not to marry. The fact that a freely made decision regarding one's private life may have certain legal consequences in the field of social security could not be seen as constituting arbitrary or unlawful interference by the State party under article 17 of the Covenant. This part of the communication was therefore inadmissible under article 3 of the Optional Protocol, as being incompatible with the provisions of the Covenant.

6.4 As regards the author's claim that he had not had a fair hearing with respect to the determination of his right to a pension benefit, the Committee noted that he had not adduced any information to substantiate, for purposes of admissibility, that the hearings concerning the determination of his pension claim were unfair. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

7. On 3 July 1996, the Human Rights Committee therefore decided that the communication was admissible as far as it might raise issues under article 26, in conjunction with article 23, paragraph 1, of the Covenant.

State party's submission on the merits and the author's comments

8.1 By submission of 6 February 1997, the State party refers to the Committee's decision in communication No. 180/1984 (Danning v. the Netherlands). It explains that in the Netherlands, marriage entails specific legal consequences that do not apply to unmarried cohabitants. The latter are free to choose whether or not to enter into matrimony; if they do, they become subject to a different set of laws. The Dutch Civil Code contains many provisions solely applicable to married couples. For example, a married person is obliged to provide for his or her spouse's maintenance; the spouse is jointly liable for debts incurred in respect of common property; a married person requires the permission of his or her spouse for certain undertakings. Matrimonial law also covers the rights and obligations in case of divorce. Likewise, inheritance law distinguishes between married and unmarried persons. According to the State party, the legal situation that formed the basis of the Committee's decision in Danning was unchanged in 1991, the year in which the author applied for a benefit under the AWW.

8.2 The State party explains that the AWW, which was in force until 1 July 1996, reflected the provisions of the Civil Code. Under the AWW, all insured persons with an income paid contributions and the risk of death was covered only so long as the marriage partner on whose death the entitlement to benefit depended remained insured. The purpose of the AWW, which entered into force on 1 October 1959, was to provide a minimum income for a person's widow who could not be deemed able to support herself by her own earnings. The conditions for an entitlement to pension were that the widow, at the time of her spouse's death (a) had an unmarried child of her own, or (b) was pregnant, or (c) was unfit for work, or (d) was 40 years or older. If none of these conditions were met, the widow was entitled to a temporary benefit.

8.3 On 7 December 1988, the CRvB decided that the restrictions of AWW entitlements to widows was incompatible with article 26 of the Covenant, and since then widowers are entitled to a benefit, under the same conditions as widows, awaiting new legislation.

8.4 The State party maintains that many legal differences remain between marriage and co-habitation and that equal treatment is by no means self-evident and cannot be claimed merely on the basis of a change in the social climate. The State party does not accept that its willingness to incorporate the equal treatment of married persons and cohabitants into legislation implies that it should be obliged to treat these two groups on an equal basis in the absence of, or prior to, the introduction of legislative measures to that effect.

8.5 In this regard, the State party also refers to its submission in communication No. 395/1990 (Sprenger v. the Netherlands)[14] and emphasizes that at no time has it taken a general decision to abolish the distinction in legal status between married and unmarried couples. However, in undertaking an extensive programme of legislation, the State party is responding to shifts in social views on this matter and is aiming to achieve the progressive introduction of equal treatment in the relevant laws. The State party emphasizes, however, that each law is being examined separately to see whether it requires amendment. The State party is of the opinion that although the equal treatment of married and unmarried couples was introduced in tax legislation in 1983 and in certain social insurance and social assistance schemes in 1987 and 1988, this does not mean that the right to equal treatment can be invoked in respect of other legislation without being formalised by law. In this connection, the State party associates itself with the individual opinion of Messrs. Ando, Herndl and Ndiaye in the Sprenger decision, in which it was stated that article 26 should be seen as a general undertaking on the part of States parties to the Covenant to regularly review their legislation in order to ensure that it corresponds to the changed needs of society.

8.6 In the instant case, the CRvB held that it was up to the legislature to decide whether married and unmarried partners should be treated alike for purposes of widow(er) pensions.

8.7 With regard to the author's argument that he and his partner received unemployment benefit as a married couple, the State party explains that the RWW benefit received by the author was not a social insurance benefit but a social assistance benefit, meant to enable persons without any other means of income to support themselves. It is awarded to persons who have no income or whose income is below the minimum set by the Government. The benefits are paid out of public funds and their amount depends on the actual situation and is means-tested. Married couples, unmarried couples and single persons sharing a home have lower costs and therefore receive a reduced benefit.

8.8 The State party refers to its new legislation, the *Surviving Dependants Act*, which entered into force on 1 July 1996. It provides for entitlement to surviving dependants who (a) have an unmarried child under the age of 18 who does not belong to another person's household, or (b) are unfit for work, or (c) were born before 1 January 1950. The benefits are means-tested. The State party points out that the author is not entitled to a pension under the new legislation, as he does not fulfil any of the conditions set out in the legislation.

8.9 In this context, the State party points out that the duration of the debate concerning the new legislation (the bill was introduced on 12 March 1991) and the problems that were encountered are evidence that it is by no means manifest that married and unmarried persons should be treated equally, outside the context of an extensive and careful legislative programme.

9. In his comments on the State party's submission, counsel notes that the State party provides general information on the distinction between married and unmarried couples, but fails to explain the specific reasons for the distinction in the AWW. He states that the author had the obligation to pay contributions under the AWW as

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[14] Views adopted on 31 March 1992.

a married person, but that he did not establish the right to benefit from the AWW as a married person. This is said to constitute discrimination within the meaning of article 26.

10.1 In a further submission, dated 16 March 1998, the State party explains that the AWW is a national insurance scheme ensuring every inhabitant of the Netherlands over 15 years of age. Pensions paid out under the scheme are funded by contributions payable by those insured. Contributions are means-tested, the contribution rate being the same for all the insured. The State party emphasizes that in determining a person's contribution under the scheme, marital status is of no account whatsoever. The State party concludes that no inequality of treatment exists on the basis of marital status in relation to persons insured under the AWW.

10.2 The State party further explains that the AWW makes a distinction between AWW pensions and temporary pensions. The AWW pension is a long-term benefit that is awarded until the person reaches the age of 65. The temporary benefit is a short-term benefit awarded for a maximum of 19 months and confined to widows or widowers who have no unmarried children, who are not pregnant or unfit to work, and have not yet attained 40 years of age. The State party submits that these persons are deemed to be capable of providing for themselves and are thus ineligible for an AWW pension, but they are awarded a temporary benefit to give them time to adjust to the situation.

Issues and proceedings before the Committee

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The issue before the Committee is whether the author is a victim of a violation of article 26 of the Covenant, because he was denied a widower's pension on the basis of his marital status. The Committee notes that on the basis of the information before it, it appears that the author, even if he had been married to his partner rather than cohabitating with her without marriage, would not have been entitled to a pension under the AWW, since he was under 40 years of age, not unfit for work and had no unmarried children to care for. The matter before the Committee is thus confined to the entitlement to a temporary benefit only.

11.3 The author has claimed that he paid contributions under the AWW as a married person, and that the failure to grant him the same rights to benefits as a married person therefore constitutes unequal treatment, in violation of article 26 of the Covenant. The State party has refuted this argument, and stated that the contribution under the AWW was the same for married and unmarried persons alike. The State party has also explained that the AWW was a national insurance, to which all Dutch residents with an income contributed, and that benefits were available, among certain other categories of persons, to married persons whose spouse had died.

11.4 The Committee recalls its jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party has argued, and this has not been contested by the author, that married and unmarried couples are still subject to different sets of laws and regulations. The Committee observes that the decision to enter into a legal status by marriage, which provides under Dutch law for certain benefits and for certain duties and responsibilities, lies entirely with the cohabitating persons. By choosing not to enter into marriage, the author has not, in law, assumed the full extent of the duties and responsibilities incumbent on married persons. Consequently, the author does not receive the full benefits provided for by law to married persons. The Committee finds that this differentiation does not constitute discrimination within the meaning of article 26 of the Covenant.[15]

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[15] See also the Committee's Views on communication No. 180/1984 (Danning v. the Netherlands), adopted on 9 April 1987.

APPENDIX

Individual opinion by Elizabeth Evatt

(concurring)

While accepting the Committee's decision in this matter, I would like to emphasise that the State party has accepted that cohabitees are to be considered as a family unit for some purposes. This factor needs to be taken into account in examining whether the grounds put forward for maintaining the distinction between married couples and cohabitees are reasonable and objective in regard to the benefit in question. In that regard, I do not find the arguments of the State party based on the legal consequences of marriage or inheritance law to be convincing or of particular relevance in regard to the granting of a benefit designed to alleviate, on a temporary basis the loss of a partner by death. For distinctions between different family groups to be regarded as reasonable and objective, they should be coherent and have regard to social reality.

(signed) Elizabeth Evatt

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

F. Communication No. 610/1995, Henry v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Nicholas Henry (represented by Mr. S. Lehrfreund from Simons Muirhead and Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	14 November 1994 (initial submission)
Date of decision on admissibility:	20 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No.610/1995 submitted to the Human Rights Committee by Mr. Nicholas Henry, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Nicholas Henry, a Jamaican citizen, at the time of submission awaiting execution in St. Catherine District Prison, Jamaica. He claims to be a victim of a violation by Jamaica of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of Simons Muirhead & Burton, a law firm in London.

1.2 The author's offence was classified as non-capital following the Offences against the Person (Amendment) Act 1992. He is to serve 20 years' imprisonment before becoming eligible for parole.

The facts as submitted by the author

2.1 On 2 March 1988, at the Circuit Court Division of the Gun Court, the author, together with a co-accused, was convicted for the murder of three policemen and sentenced to death. The Court of Appeal, on 2 March 1989, refused his application for leave to appeal. On 10 November 1993, the Judicial Committee of the Privy Council dismissed his petition for special leave to appeal. It is submitted that herewith all domestic remedies have been exhausted. In this context, it is argued that the constitutional remedy, which exists in theory, is not available to the author in practice, because of his lack of funds and the unavailability of legal aid. Reference is made to the Committee's jurisprudence in this matter.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 At the trial, the case for the prosecution was that, on 19 November 1986, a number of armed men attacked Olympic Police Station and killed three of the five policemen present. The author was accused of being an accessory to the murder in that he had assisted the members of the group in making molotov cocktails, had lied to a constable about their intention, had learned from the others that they intended to attack the police station, had received the members of the group at his house, and had assisted in hiding a large number of weapons after the event. The evidence against the author was based on a statement he had given to the police after having been cautioned and on testimony from a police officer who had spoken with the author the night before the raid. The author's statement to the police was admitted into evidence by the judge after a voir dire.

2.3 The author's defense was one of duress. He gave an unsworn statement from the dock, in which he stated that he had assisted the group of men out of fear for repercussions, that he had not been present during the attack on the police station, and that he had signed the statement to the police because he was told that it could do no harm.

The complaint

3.1 The author claims that he is a victim of a violation of articles 7 and 10, paragraph 1, of the Covenant, since he was beaten and maltreated by the police upon his arrest at his home on 20 November 1986. In particular, he claims that he was forced to eat hot dumplings from the cooking pot, which caused burns and bleeding in his mouth. The author submits that he signed the statement at the police station because he hoped to receive medical treatment. Although he was given some ice, he received no medical treatment and he states that he could not eat anything for months. He claims that he can still not eat any hot food. He also claims that he still suffers from neck pains as a consequence of the beatings.

3.2 The author also claims that he has a medical problem with his testicles since 1988. Despite requests, prison authorities refuse to take him to the hospital. In the beginning of 1992, he saw a doctor, who stated that surgery was necessary and who gave an approximate date of April 1992 for the operation. Despite this, and despite several requests made by the author and his representatives (copies of correspondence are enclosed), the author was never hospitalised and still has not received any medical treatment for his condition. The lack of medical treatment is said to amount to a violation of articles 7 and 10, paragraph 1, of the Covenant. In this context, reference is made to the UN Standard Minimum Rules for the Treatment of Prisoners and to the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment.

3.3 It is further alleged that the author was subjected to ill-treatment on 4 May 1993. On that date, a search was carried out by warders and soldiers during which the author was assaulted by a soldier with a metal detector on his testicles. The author complained to the prison authorities and the Jamaica Council for Human Rights took a statement from him. The author's London counsel requested, on 3 September 1993, the Parliamentary Ombudsman to conduct an urgent investigation into the allegation of ill-treatment. The Ombudsman sent an investigator to the prison, and submitted a report to the Superintendent, who promised to make arrangements for medical treatment. The author claims that no such treatment was ever received.

3.4 It is submitted that the author has made all reasonable efforts to seek redress in respect of the ill-treatment suffered in detention, that, due to the author's lack of funds and the unavailability of legal aid, constitutional redress is not an available remedy, and that therefore the author fulfils the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In this context, it is stated that the author has been subjected to threats ever since his complaint against his ill-treatment, and that he fears reprisals.

3.5 The author further submits that he has been held on death row since his conviction in March 1988, that is for over six years. It is submitted that the 'agony of suspense' resulting from such a long wait and expected death, amounts to cruel, inhuman and degrading treatment. In this context, the author refers to the Privy Council's judgment of 2 November 1993 in the case of Pratt & Morgan.

3.6 The author further alleges that he is a victim of a violation of article 14, paragraphs 1 and 2, of the Covenant. He refers to the Committee's prior jurisprudence and submits that the judge's summing-up at his trial did not meet the requirements of impartiality and in effect amounted to a denial of justice. In this connection, the author contends that the language used by the judge in directing the jury was so emotive[16] that it excited sympathy for the victims and prejudice for the accused, weakened the judge's warnings to the jury to be impartial and undermined the directions to the jury on the burden and standard of proof.

3.7 The author also alleges that his legal aid lawyer did not properly defend him. In this context, the author claims that the police sent a little boy to take out guns from the cellar under the house next to him. He submits that no guns were found in his yard. He states that he told the lawyer to take a statement from the boy, but that he never did. He also indicates that the lawyer did not use the statements which the police had taken from his mother and common-law wife. The author argues that article 14, paragraph 3 (d), entitles an accused to effective legal assistance. In this context, it is also submitted that no witnesses were called on the author's behalf. The author claims therefore that his lawyer did not act diligently nor provided effective representation, in violation of article 14, paragraph 3 (d).

3.8 It is further submitted that a different lawyer represented the author at the preliminary hearings and that he met the lawyer who represented him at the trial only on the first day of the trial. Upon request, the judge granted an adjournment of the trial until the next day. The lawyer then came to visit the author in prison that evening and the trial started the following day. It is argued that one day to prepare the defence in a capital murder case is highly insufficient and constitutes a violation of article 14, paragraph 3 (b). In this context, it is argued that, if the lawyer would have been given more time to prepare the defence, he would have been able to call witnesses on the author's behalf or to take statements from them.

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[16] Reference is made inter alia to the following passage: "Death is always a very sad thing, but I think death becomes worse when one dies in circumstances such as these. I think no one of you there in all honesty can say that you did not have prior knowledge of this incident because, indeed, it was a horrible incident, an incident unprecedented in Jamaica, an incident which not only got to our local news media but the news media abroad, and an incident in which I think no one in Jamaica did not recoil in horror that our own Jamaicans could do such a dastardly act. Time has passed and maybe some of the anger that you had then has passed with it. What I ask you today is not to confuse or not to mix such anger and such resentment as you felt with the trial you have before you."

State party's observations and author's comments

4.1 By note of 15 March 1995, the State party submits its observations on the merits of the communication, in order to expedite its examination.

4.2 With regard to the author's allegations that he was denied medical attention and that he was ill treated in prison on 4 May 1993, the State party promises to investigate his allegations and to inform the Committee of the outcome of the investigations.

4.3 Concerning the author's claims under article 14 (1) and 14 (2), in relation to the summing-up by the judge, the State party argues that these are matters outside the Committee's jurisdiction and refers to the Committee's jurisprudence in this respect. The State party points out that the appellate courts already examined the judge's summing-up.

4.4 The State party does not accept that there were breaches of article 14 (3) (b) and (d) for which it is responsible. In respect of the claim that the author did not have adequate time to prepare his defence, the State party notes that counsel applied for and received an adjournment. If he would have required more time it was open to him to apply for it. With regard to the conduct of the defence, the State party submits that it is its duty to provide competent legal aid counsel and not to interfere with the conduct of the defence. The State party argues that it is not responsible for the manner in which counsel conducts his case and for any errors of judgement which he may or may not have made.

5.1 In his comments, counsel agrees to an examination of the merits of the communication.

5.2 With regard to the judge's summing-up, counsel submits that if it is clear that the instructions were manifestly arbitrary or amounted to a denial of justice, or that the judge otherwise violated her obligation of impartiality, the matter can be brought within the jurisdiction of the Committee. In this context, counsel refers to the Committee's jurisprudence[17]. Counsel argues that the judge's summing up did not meet the standards of impartiality and amounted to a denial of justice.

5.3 With regard to the conduct of the trial, counsel concedes that the shortcomings of privately retained lawyers cannot be attributed to the State party, but argues that this does not apply to legal aid lawyers, who once assigned must provide effective representation.

5.4 In a further submission, counsel refers to an incident in prison following a protest by inmates concerning the perceived reduction of their visits on 28 February 1995. A day later, on 1 March 1995, the warders allegedly came to the death row section and started beating up inmates. The author was told to come out of his cell, and was beaten by the warders. He was also thrown down the stairs. As a result, his head got busted in two places, as well as his elbow. His ears were cut up, and he suffered a ringing in his ears. His hands were hurting and his fingers were swollen. He passed blood in his urine and his ribs on one side hurt so much that he could not touch them. The author states that his wounds were dressed at the surgery, and that he was given a pain killer which he did not take. He states that he was in a lot of pain. After he and other inmates began a hunger strike, the Commissioner of Prisons told the warders to take the author to the hospital. Instead, a doctor came to see the author in prison and told him that his ribs were not fractured, but that his lung was damaged. He was prescribed medication. After three days, the warders allegedly changed this to another pill, which the author did not take. It is submitted that the ill-treatment and the subsequent denial of proper medical attention are in violation of articles 7 and 10 of the Covenant.

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[17] Communication No. 237/1987 (Denroy Gordon v. Jamaica), Views adopted on 5 November 1992, and communication No. 232/1987 (Daniel Pinto v. Trinidad and Tobago), Views adopted on 20 July 1990.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the author's claim concerning the summing-up by the trial judge, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to review the instructions to the jury by the trial judge, unless it can be ascertained that they were manifestly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the summing-up suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.4 The Committee notes that the State party has forwarded comments on the merits of the communication and that counsel has agreed to an examination of the merits at this stage. The Committee considers the remaining claims of the communication admissible and proceeds, without further delay, to an examination of their substance in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant, because the author was maltreated by the police upon his arrest, the Committee notes that the issue was subject of a voir dire and that it was before the jury during the trial, that the jury rejected the author's allegations, and that the matter was not raised on appeal. The Committee finds that the information before it does not justify the finding of a violation of articles 7 and 10, paragraph 1, of the Covenant in this respect.

7.2 The author has claimed that his detention on death row in itself constitutes a violation of article 7 of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case for over seven years - does not violate the Covenant in the absence of further compelling circumstances.[18]

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[18] See, inter alia, the Committee's Views in respect of communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996.

7.3 Mr. Henry also alleges that he has suffered lack of medical treatment despite a recommendation from a doctor that he be operated. The author has further submitted detailed claims that he was beaten by soldiers and warders on 4 May 1993 and again on 1 March 1995. The author's claims have not been refuted by the State party, which has promised to investigate but has not communicated the results of its investigation, even though more than three years have passed since. The Committee recalls that a State party is under the obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol. In the absence of any explanation by the State party, due weight must be given to the author's allegations. The Committee considers that the lack of medical treatment is in violation of article 10 of the Covenant, and that the beatings which the author suffered constitute violations of article 7 of the Covenant.

7.4 The author has claimed that the bad quality of the defence put forward by his counsel at trial resulted in depriving him of a fair trial. Reference has been made in particular to counsel's alleged failure to call witnesses for the defence. The Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraph 3 (d) and (e), in this respect.

7.5 The author has also claimed that he did not have enough time to prepare his defence, since he met his lawyer only on the first day of the trial. In this context, the Committee reiterates its jurisprudence that the right of an accused person to have adequate time and facilities for the preparation of his defence is an important aspect of the principle of equality of arms. Where a capital sentence may be pronounced on the accused, sufficient time must be granted to the accused and his counsel to prepare the defence. The determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case. The Committee notes from the information before it that the author's lawyer requested an adjournment of one day at the beginning of the trial and that this request was granted. The material before the Committee does not reveal that either counsel or the author ever complained to the trial judge that the time for preparation of the defence was inadequate. If counsel or the author felt inadequately prepared, it was incumbent upon them to request an adjournment. In the circumstances, there is no basis for finding a violation of article 14, paragraph 3 (b).

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Nicholas Henry with an effective remedy, including immediate medical examination and treatment if necessary, compensation, and consideration of early release. The State party is under an obligation to take measures that similar violations not occur.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol it is subject to the

continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 613/1995, Leehong v. Jamaica (Views adopted on 13 July 1999, sixty-sixth session)*

Submitted by:	Anthony Leehong (represented by Ronald McHugh of Clifford Chance, London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	5 January 1995 (initial submission)
Date of decision on admissibility:	16 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 13 July 1999,

Having concluded its consideration of communication No. 613/1995 submitted to the Human Rights Committee by Anthony Leehong, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Anthony Leehong, a Jamaican citizen who at the time of submission communication was awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 9; 10; 14 and 17 of the International Covenant on Civil and Political Rights. He is represented by Mr. Ronald McHugh of the London law firm of Clifford Chance. The author's death sentence has been commuted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The facts as submitted by the author

2.1 A warrant for the author's arrest was issued on 5 December 1988.[19] On 20 December 1988, while walking down a street, the author was shot from behind by the police, without any warning. The author was brought to Kingston Public Hospital by two passers-by. On 22 December 1988, while in hospital, the author was allegedly told by the police that he was under arrest for the murder of a police man which had taken place in early December 1988. He remained in hospital, under police guard, until 29 December 1988; he was then taken to the Central Lock-Up in Kingston, allegedly still in connection with the murder of the policeman and to stand an identification parade in this respect. On 31 March 1989, the author and another person were brought before the Magistrates Division of the Gun Court in connection with the murder of the policeman; this charge was dropped. The author states that the investigating officer did not recognize him. In this respect, he points out that the officer asked the co-accused whether he was Anthony Leehong; after receiving a negative reply, the officer told the author and the examining magistrate that he had obtained a warrant for the author's arrest and that in the hospital he had charged the author with the murder of one Carlos Wiggan. The author states that only then did he learn that he had been arrested and charged for the murder of Carlos Wiggan.

2.2 On 21 February 1990, after 13 minutes of deliberation, the jury returned a verdict of guilty. The author was sentenced to death. On 28 January 1991, the Court of Appeal dismissed his application for leave to appeal. A further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 7 February 1994. With this, it is submitted, all domestic remedies have been exhausted. On 13 November 1994, the author's offence was reclassified as non-capital under the Jamaican Offences Against the Person (Amendment) Act 1992. His death sentence has been commuted to life imprisonment, serving a minimum of 20 years before being eligible for parole.

2.3 The preliminary enquiry before the Gun Court relating to the murder of Carlos Wiggan started on 20 June 1989. The author was represented by a legal aid attorney. This attorney, however, did not attend the second hearing held on 11 July 1989, when the arresting officer gave his deposition; the author was unrepresented during this hearing. The attorney was present at the third hearing held on 13 September 1989. During these hearings, eye-witnesses identified the author as the assailant of Carlos Wiggan; no prior identification parade had been held.

2.4 Subsequently, the author's mother succeeded in obtaining the services of another lawyer. The trial was scheduled to start on 19 February 1990, but was adjourned until 21 February 1990, in order for the author's lawyer to prepare the case. The author met his lawyer on two occasions for a period of between two and four hours in all.

2.5 The case for the prosecution was that, in the morning of 4 December 1988, in the Parish of St. Andrew, the author killed Carlos Wiggan with two gunshots. The author claims to be innocent and that he was at home during the time of the crime.

2.6 At the trial, the prosecution relied on the testimony of the deceased's stepfather, his mother and his sister. The stepfather of the deceased testified that on 4 December 1988, at about 9:30 a.m., he heard an explosion. When he looked out of the window, he saw a person whom he knew by the name of Peter, and whom he identified as being the author, running after Carlos Wiggan, and shooting him twice. Firing further shots, the author ran away, together with another person.

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[19] During the trial the investigating officer corporal Blanford David stated that on 5 December 1988 he had obtained a warrant of arrest for the accused Anthony Leehong also known as Peter or Powder-Puff, in connection with the murder of C. Wiggan.

2.7 The mother of the deceased testified that, on the morning of the incident, she looked down from the balcony and saw her son standing against a wall with the author holding a gun in front of him. She also noticed two other men standing nearby. She then saw the author shooting at her son, who tried to escape. As the persons moved, she could not observe what happened; she could only hear shots. When she came out of the house, she saw her son lying on the ground. She stated that she had the author in sight for two to three minutes and that she had never seen him before.

2.8 The deceased's sister testified, that she saw the author, whom she had known for two years, shooting at her brother, and then chasing him. She then heard other gunshots and saw the author leaving the premises, without a gun.

2.9 The author's defence claimed that the three witnesses for the prosecution had mistakenly identified the author. The author himself, in an unsworn statement, denied that he was called Peter or that he had killed the deceased. No witnesses were called on behalf of the defence.

The complaint

3.1 Counsel submits that the manner in which the police apprehended the author, by shooting him from behind without giving an order to stop or a warning, was in breach of article 9, paragraph 1. In this context, he submits that the author was unarmed and that he did not pose any threat to the police or to the public.

3.2 The author claims violations of articles 9, paragraph 2, and 14, paragraph 3(a), since he only learned that he had been arrested and charged for the murder of Carlos Wiggan on 31 March 1989, when he was taken before the examining magistrate. He claims that on 22 December 1988, in the hospital, he was not aware of having been arrested and charged with the murder of which he was convicted, and that he was not given a copy of the warrant or the charge sheet. Furthermore, the author does not recall whether he was cautioned. Counsel argues that, if the author was informed at all, it was done in circumstances in which he could not understand what was going on. Counsel adds that he, as well as the Jamaica Council for Human Rights have requested information from the Kingston Public Hospital about the author's physical condition at the time of his arrest, but that no reply has been received to date.

3.3 The author points out that he was not brought before a judge until three months after his arrest, and then it was in relation to the murder of a policeman, the author was not charged for that murder. However, he was then charged and remanded into custody for the murder of Wiggan. It was another 3 months before he was brought before a judge with respect to this second murder of which he was subsequently convicted. He submits that this constitutes a violation of article 9, paragraph 3, of the Covenant. In this context, reference is made to the Committee's jurisprudence,[20] where it was held that a delay of 6 weeks from arrest to appearance before a judge amounted to a violation of article 9.

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[20] See the Committee's Views on communications Nos. 253/1987 (Paul Kelly v. Jamaica), adopted on 8 April 1991, and 248/1987 (Glenford Campbell v. Jamaica), adopted on 30 March 1992.

3.4 The author further points out that the trial against him did not start until 21 February 1990. He claims that a delay of 14 months between arrest and trial amounts to a violation of article 9, paragraph 3. Moreover, it is submitted that the author should have been released from detention, while awaiting trial.

3.5 The author claims that he was not given adequate time and facilities for the preparation of his defence, in violation of article 14, paragraph 3(b). As to the preliminary examination, he claims that he saw his legal aid attorney for the first time at the first hearing, that no witnesses were called on his behalf, and that the attorney did not attend the second hearing, as a result of which no cross-examination of the arresting officer took place. As to the trial, the author claims that his privately retained lawyer failed to properly cross-examine the witnesses against him, due to lack of preparation. In this context, it is submitted that there were serious discrepancies between the testimonies of the prosecution's witnesses. This is said to constitute a violation of article 14, paragraph 3(e), of the Covenant.

3.6 As to a violation of the author's rights under article 14, paragraph 1, counsel refers to passages of the judge's summing-up to the jury. It is submitted that the trial judge failed to properly direct the jury, according to the legal rules required in identification cases (Turnball guidelines), and that this amounted to a denial of justice. In particular, it is said that the judge did not properly point out the danger of relying on visual identification evidence, nor to the weaknesses in the evidence. It is further submitted that the judge's instructions reversed the burden of proof. This is said to amount to a violation of article 14, paragraph 2.

3.7 It is further contended that the author's right to a review of his conviction and sentence by the Court of Appeal was not in accordance with article 14, paragraphs 3(d) and 5. Counsel explains that the author's lawyer (who had also represented him at trial) indicated before the Court of Appeal that there was no merit in the appeal, without having consulted the author. From the notice to appeal, it transpires that the author did not wish to be present in Court when his appeal was considered. Furthermore, counsel claims the author was not informed that his appeal was being heard, and consequently did not have the opportunity to instruct his lawyer. It is stated that, had the author been aware that his lawyer saw no merits in the case and was not going to argue any grounds on his behalf, thereby effectively withdrawing the appeal, he would have changed his legal representation.[21]

3.8 It is further submitted that the delays in the various stages of the judicial proceedings against the author, and in particular the delay in obtaining the court documents necessary for the preparation of a petition for special leave to appeal to the Judicial Committee of the Privy Council, amounted to a violation of article 14, paragraph 3(c). In this context, counsel states that he first requested copies of the court documents on 27 June 1991; the trial transcript and the Court of Appeal's judgement were only received in February 1992, after numerous requests to the Jamaican judicial authorities by counsel and the Jamaica Council for Human Rights. The depositions made during the preliminary hearings in the author's case were finally received on 24 August 1992.

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[21] Reference is made to the Committee's Views on communications Nos. 356/1989 (Trevor Collins v. Jamaica), adopted on 25 March 1993; 353/1988 (Lloyd Grant v. Jamaica), adopted on 31 March 1994; and 250/1987 (Carlton Reid v. Jamaica), adopted on 20 July 1990.

3.9 The author gives a detailed description of acts of ill-treatment to which he has been allegedly subjected to at St. Catherine District Prison. Reportedly, on 17 November 1991, he was denied food and water. The day after, he was struck with batons; he received death threats from warders on several occasions. He states that he is denied medical treatment and visitors. The author's counsel wrote several times to the Parliamentary Ombudsman on behalf of his client. On 8 February and 6 April 1994, the Office of the Parliamentary Ombudsman replied mistakenly that the author had been discharged from prison. According to counsel, this demonstrates the superficial nature of the Ombudsman's investigations. After counsel had pointed out that the author was still incarcerated and remained the subject of ill-treatment, the Ombudsman replied that the warder responsible in the case had been transferred. Nevertheless, it is submitted that the threats and violence against the author continue. Furthermore, on five occasions counsel wrote letters to the Commissioner of Corrections, who, on 27 October 1994, merely informed him that a new superintendent had been appointed to the prison, without addressing any of the specific complaints raised on behalf of the author. On 7 October 1994, counsel was informed by the Ombudsman that its recent representations on behalf of the author had been referred for investigation to the Director of Investigations and that a report would be received soon. No such report has been received to date.

3.10 Reference is made to documentary evidence of the inhuman conditions of detention at St. Catherine District Prison, in particular as to the hygienic and sanitary conditions.

3.11 The author concludes that the maltreatment he has been - and is being - subjected to at St. Catherine District Prison, and his present conditions of incarceration amount to violations of articles 7, 10, paragraph 1, and 17 of the Covenant. He emphasizes that the conditions of imprisonment are seriously undermining his health. While on death row, he has only been allowed to see a doctor once, despite having sustained beatings by warders and having requested medical attention.

3.12 With reference to recent decisions of various judicial instances dealing with the death row phenomenon, it is submitted that to execute the author after the prolonged period of time he has been detained on death row would amount to cruel, inhuman or degrading treatment, in violation of article 7 of the Covenant.

State party's information and observations on admissibility and the author's comments thereon

4. On 10 January 1995, the communication was transmitted to the State party, requesting it to submit to the Committee information and observations in respect of the question of admissibility of the communication. No reply was received. On 31 January 1995, the State party informed the Committee that the offence for which the author had been convicted had been classified as non-capital and that the author was no longer on death row.

5. On 24 January 1995, counsel informed the Committee that the author's death sentence had been commuted.

6.1 During the 58th session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee had ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 The Committee noted with concern the absence of cooperation from the State party on the matter under consideration. In particular it observed that the State party had failed to provide information on the question of admissibility of the communication. On the basis of the information before it the Committee found that it was not precluded by article 5, paragraph 2(b) of the Optional Protocol from considering the communication.

6.4 The Committee considered that, in the absence of information provided by the State party, the author had sufficiently substantiated for the purposes of admissibility, his claim that he was shot before his arrest and the ill-treatment he had been subjected to while at St. Catherine District Prison. This part of the communication might raise issues under articles 7, 9, paragraph 1 and 10 paragraph 1, of the Covenant which need to be examined on the merits. Counsel had alleged a violation of article 17 of the Covenant with no further substantiation.

6.5 With regard to the author's claim that the length of his detention on death row amounts to a violation of article 7 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 the Covenant, in the absence of some further compelling circumstances.[22]

6.6 With regard to the author's claim that he was not tried without undue delay in violation of articles 9, paragraph 3 and 14, paragraph 3 (c), the Committee considered that a delay of 14 months could not be construed as being unreasonable. Consequently, the Committee found that in this respect the author had no claim under article 2 of the Optional Protocol.

6.7 With regard to the author's claim that he was not tried without undue delay in violation of article 14, paragraph 3 (c), because of the delay in obtaining the court documents, by counsel in London, the records show that the trial transcript was available to the author (or his counsel) when the appeal was heard. It also transpires from the trial transcript that the preliminary depositions made by the witnesses were also available to the author (or his counsel) during the trial, as evidenced by the cross examination which took place. The Committee considered that the author's counsel had not substantiated this claim for purposes of admissibility. Consequently, this part of the communication was inadmissible under article 2 of the Optional Protocol.

6.8 As to the author's claims under article 9, paragraphs 1 and 2 and 14, paragraph 3 (a) of the Covenant, in that the author was not informed of the reasons for his arrest, the Committee considered that in the absence of information from the State party, the author and his counsel had sufficiently substantiated this claim for purposes of admissibility. Accordingly, the Committee considered that this part of the communication should be examined on the merits. It invited counsel to provide the Committee with more precise information regarding the original crime, i.e. the murder of the policeman, and its outcome; the incident, of 20 December 1988, in which the author was shot and subsequently arrested. The Committee invited the State party to provide it with a detailed chronology of the events in the author's case.

6.9 The author had alleged that he was not brought before a judge until three months after his arrest and it was 6 months before he was brought before a judge in connection with the crime for which he was finally convicted. The Committee found that in the absence of a reply, in this respect, from the State party, the author and his counsel had sufficiently substantiated this allegation for purposes of admissibility, and it should be examined on the merits.

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[22] See the Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996, paras. 8.2-8.5.

6.10 As regards the author's complaint that he was not properly represented during his trial in violation of article 14 paragraph 3 (b), and (e), the Committee considered that the State party could not be held accountable for alleged errors made by a defence lawyer, unless it was manifest to the judge that the lawyer's behaviour was incompatible with the interest of justice. In the instant case, there was no reason to believe that counsel was not using other than his best judgement and this part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.11 As regards the author's claim that he was not properly represented by his counsel on appeal in violation of article 14, paragraph 3 (d), the Committee noted from the information before it that counsel did in fact consult with the author prior to the hearing, and that at the hearing the court of appeal examined the case. The Committee considered that it was not for the Committee to question counsel's professional judgement as to how to argue or not the appeal, unless it is manifest that his behaviour was incompatible with the interests of justice. The Committee recalled that article 14, paragraph 3 (d), does not entitle the accused to choose counsel provided to him free of charge. The Committee found therefore that, in this respect, the author has no claim under article 2 of the Optional Protocol.

6.12 The author's remaining allegations concerned claims about irregularities in the court proceedings and improper instructions from the judge to the jury on the issue of identification. The Committee reiterated that, while article 14 guarantees the right to a fair trial, it is not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee does not show that the judge's instructions suffered from such defects, but rather to the contrary, the Court of Appeal judgement expressly stated that the trial judge's instructions had been: "clear, fair and adequate". Accordingly, this part of the communication was inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

6.13 Consequently on 16 October 1996 the Human Rights Committee declared that the communication was admissible inasmuch as it appeared to raise issues under articles 7 and 10, paragraph 1 in respect of the ill-treatment and articles 9, paragraphs 1, 2 and 3; and 14, paragraph 3 (a), of the Covenant.

States party's observations of the merits and counsel's comments

7.1 In a submission dated 17 December 1997, the State party informed the Committee it would investigate the author's allegations of ill-treatment in prison.

7.2 With regard to the alleged breach of article 9, paragraph 1, due to the circumstances under which the author was arrested, shot by police from behind, the State party has promised to have the allegation investigated. However, it requested that counsel provide additional information in respect of the incident: whether the author had been detained during a joint police operation? whether there was an exchange of gun-fire between the police and the other parties? It further states that these questions do not in anyway constitute an acknowledgement that there was any breach of this article.

7.3 With respect to the claims under articles 9, paragraph 2, and 14, paragraph 3 (a), in that the author was not promptly informed of the charges against him, the State party contends that the allegations are confusing: "In paragraph 7 of the [original] communication it is stated that a warrant for his arrest was executed on the author on December 22 1988. In paragraph 31 the author states that he was not aware of the warrant being executed on him. In the same breath, the applicant admits that he was told that he had been arrested and the nature of the offence. This was confirmed by the author's mother. Therefore, the author cannot honestly say that he was unaware of the charges against him until he came to trial."

7.4 The State party further denies any breach of the Covenant in respect of article 9, paragraph 3 of the Covenant since the author was brought before a magistrate prior to the holding of the preliminary enquiry.

8.1 By submission dated 8 April 1998, counsel provided a memorandum with a chronology of events as known to the defence, where the claims, that the author had been shot from behind when arrested and that he was not aware of the charges against him are reiterated.

8.2 In a further submission dated 29 June 1998, counsel looks forward to receiving the State party's information in respect of the circumstances of the author's arrest, his ill-treatment at St. Catherine's District Prison and the chronology of events leading to the author's arrest as requested by Committee in its admissibility decision. He refers the State party to his submission of April 1998 in order to respond to the State party's questions in the note verbale of 17 December 1997.

8.3 With regard to the State party's challenge of a violation of articles 9, paragraph 2 and 14 paragraph 3 (a) in that the author was not promptly informed of the charges against him counsel reiterates that the author was not aware at the time of his arrest on 22 December 1988, of the charges against him. In particular, he claims that the Jamaican police did not inform the author of the fact of, or the reasons for his arrest but merely notified him that he would have to take part in an identification parade. The author was finally made aware of the charges against him only on 31 March 1989, over three months after his violent apprehension. Counsel points out that the State party has not addressed the fact that the charges made against the author on 22 December were dropped and that it was not until 31 March 1989 that he was told that he was being charged with the murder (of Mr. Wiggan) for which he was later tried.

8.4 As regards the violation of article 9, paragraph 3, counsel reiterates his original claim. He notes that the author was arrested on 22 December 1988, for the murder of a policeman, brought before a magistrate on 31 March, and charged at that time with the murder of Mr. Wiggan. The charges against him for the policeman's murder were dropped for lack of evidence. The preliminary hearing for the murder of Carlos Wiggan was held on 20 June 1989. Counsel holds that the author was brought before a judge in connection with the crime for which he was finally convicted of, only after a 6-month delay.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the author's complaints of ill-treatment while in detention at St. Catherine's District Prison, the Committee notes that author has made very precise allegations, relating to the incidents referred to in paragraph 3.11 supra. These allegations have not been contested by the State party, except to say that it would investigate. There is no information from the State party as to whether an investigation has been carried out and if so, what its result has been, contrary to its obligation to cooperate with the Committee as required by article 4, paragraph 2 of the Optional Protocol. In the Committee's opinion, the ill-treatment and conditions described are such as to violate the author's right to be treated with humanity and with respect for the inherent dignity of the human person and the right not to be subjected to cruel, inhuman or degrading treatment, and are therefore contrary to articles 7, and 10, paragraph 1.

9.3 With respect to the author's claim that he was shot by the police from behind before being arrested, the Committee reiterates its jurisprudence where it has held that it is insufficient for the State party to simply say that there has been no breach of the Covenant. Consequently, the Committee finds that in the circumstances the State party not having provided any evidence in respect of the investigation it alleges to have carried out the shooting remains uncontested and due weight must be given to the author's allegations. Accordingly, the Committee finds that there has been a violation of article 9, paragraph 1, with respect to the author's right to security of the person.

9.4 The author has claimed a violation of articles 9, paragraph 2, and 14, paragraph 3(a), since he was not informed of the charges against him at the time of his arrest. After a police officer was killed, the author was charged and arrested. Later after an investigation, the original charge was dropped for lack of evidence, but it appears that the author was the suspect of another murder and was kept in detention before being charged and sentenced for the second crime. In the circumstance of the case and on the basis of the information before it, the Committee finds that there has been no violation of the articles 9, paragraph 2, and 14, paragraph 3, of the Covenant.

9.5 The author has claimed a violation of article 9, paragraph 3, in as much as he was not brought before a magistrate after his arrest on 22 December 1988. It was only on 31 March 1989 that he was brought before the Magistrates Division of the Gun Court. There was thus a delay of more than three months before he was produced before a judicial authority. The Committee notes that the State party has admitted the delay of more than 3 months between the date of arrest and the date he was brought before a judicial authority, but has offered no explanation for this delay and merely contended that there has been no violation of the Covenant. The Committee is of the view that mere assertion that the delay does not constitute a violation is not sufficient explanation. The Committee therefore finds that 3 months to bring an accused before a magistrate does not comply with the minimum guarantees required by the Covenant. Consequently, and in the circumstance of the case the Committee finds that there has been a violation of article 9, paragraph 3 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 7, 10, paragraph 1, 9, paragraphs 1, and 3, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Leehong with an effective remedy, entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 614/1995, Thomas v. Jamaica (Views adopted on 31 March 1999, sixty-fifth session)*

Submitted by:	Samuel Thomas (represented by Mr. Jan Cohen of Mishcon de Reya)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	5 January 1995 (initial submission)
Prior decision:	Special Rapporteur's rule 91 decision, transmitted to the State party on 23 January 1995
Date of decision on admissibility:	7 October 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1999,

Having concluded its consideration of communication No. 614/1995 submitted to the Human Rights Committee by Samuel Thomas, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Samuel Thomas, a Jamaican citizen, who at time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10, 14 and 17 of the International Covenant on Civil and Political Rights. He is represented by Jan Cohen of Mishcon de Reya. The author's death sentence has been commuted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of an individual opinion by Committee member Hipólito Solari Yrigoyen is appended to the present document.

The facts as submitted by the author

2.1 On 25 April 1990, the author and three co-defendants[23] were convicted for the capital murder of one Elijah McLean, on 24 January 1989, and sentenced to death. The Court of Appeal of Jamaica dismissed their appeals on 16 March 1992. On 6 July 1994, the Judicial Committee of the Privy Council dismissed the author's petition for special leave to appeal. With this, it is submitted, all domestic remedies have been exhausted. Following the enactment of the Offences Against the Persons (Amendment) Act 1992, Jamaica created two categories of murder, capital and non capital, consequently all persons previously convicted of murder had their conviction reviewed and reclassified under the new system. The author's offence was reconfirmed as "capital".

2.2 The case for the prosecution was that the four accused were among seven men who entered the house of the deceased in the early morning of 24 January 1989, dragged him out of his bed, took him outside into the yard, and chopped him several times with their machetes, thereby killing him.

2.3 The prosecution relied upon the evidence of three relatives of the deceased, aged eleven, fourteen and seventeen, who lived at the deceased's house. They testified that they were awakened by sounds emanating from the room where the deceased and his common law wife were sleeping. They went to the doorway and saw one of the co-defendants (Byron Young) with a flashlight in one hand and a gun in the other pointing it at the deceased. Six other men, among whom they recognized the author, all carrying machetes, were standing by the bed of the deceased, and one of the men chopped him on his forehead. All seven men then pulled the deceased off the bed and carried him outside. The deceased held onto the door and was chopped on the hand by one of the men. The witnesses further testified that, in the yard, he was chopped several times by the men, including the author, while co-defendant Young stood in their midst with his gun still in his hand. All seven men then left.

2.4 The case for the defence was based on alibi. The author made an unsworn statement from the dock, maintaining that he was not present at the locus in quo and that he had no knowledge of the murder. The issue was therefore one of identification and the defence was solely directed at the witnesses' credibility and their ability, given the lighting in the room and the yard at the time of the incident, to correctly identify the author.

2.5 At the end of the judge's summing-up, the jury retired at 2:31 p.m. and returned at 3:14 p.m. to announce that they had not arrived at a unanimous verdict. The judge told them that he could not at that stage accept anything but a unanimous verdict, and the jury retired again at 3:16 p.m. They returned at 4:27 p.m. and the foreman again announced that they had not arrived at a unanimous verdict. The judge then stated: "I am afraid that this is not a case in which I can accept a majority verdict, this is a murder case and your verdict must be unanimous one way or the other. [...] None must be false to the oath that he has taken to return a true verdict, but in order to arrive at a collective verdict, a verdict upon which you all agree, there must necessarily be some giving and taking. There will be arguments [...], but at the same time there must be [...] certain adjustment of views. Each of you must listen to the voices of the other and don't be dogmatic about it [...]. None of you should be unwilling to listen to the argument of the other. If any of you have a strong view, or you are in a state of uncertainty, you are not obliged or entitled to sink your view and agree with the majority, but what I tell you to do is to argue out and discuss the matter together and see whether or not you can arrive at a unanimous verdict". The foreman then asked the judge a question relating to the evidence, and after having it explained, the jury retired at 4:41 p.m. They returned at 5:30 p.m. and the foreman announced that they had arrived at a unanimous verdict, finding all four accused guilty as charged.

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[23] Among the co-defendants were Hixford Morrison and Byron Young, whose cases were decided by the Committee: communication No. 611/1995 (Views adopted on 31 July 1998) and communication No. 615/1995 (Views adopted on 4 November 1997), respectively.

2.6 Counsel forwards sworn affidavits from Terence Douglas and Daphne Harrison, two members of the jury who sat throughout the course of the trial and were present at the jury's deliberations.

- In his affidavit, dated 3 May 1990, Terence Douglas testifies that:"[...] On the last day of the trial - out of the twelve jurors - only three jurors found the men guilty. Because it was getting late and the foreman was pressuring us, we just told him to do what he wants. The foreman then stood up at 6:10 p.m. and said that he found all four men guilty. [...] After the case was dismissed I went outside and started to cry because I know that the four men are innocent, although the first day of the court was the first time I was seeing them. I would like the [Jamaican] Council [for Human Rights] to get a re-trial for these men because they did not get a fair trial."

- In her affidavit, dated 12 June 1990, Daphne Harrison testifies that: "[...] On our first deliberation, nine of us had come to the decision that the quality of the evidence was so poor and conflicting, that we saw no reason why the men should not be acquitted. After the foreman had informed the court that we could not arrive at a unanimous verdict, we were further addressed by the trial judge. However, on our second deliberation the situation remained the same. On our final deliberation, the nine - eight others and myself - held steadfast to our decision as we genuinely believed that the evidence was poor. However, as it was getting late and we had all wanted to go home, and the fact that we were becoming frustrated, we all turned to the foreman and two jurors and said: "Alright, you can all do whatever you want to do, but remember, we are not a party to any guilty verdict". The foreman then remarked: "I only hope that when I get out there none of you say anything". Mrs. Harrison further states that: "I am willing to attest to this statement in any court at anytime if I am required to do so".

2.7 The author's lawyer filed the grounds of appeal on 1 May 1990. The appeal of all four co-defendants to the Court of Appeal of Jamaica was based on the trial judge's failure, in his directions to the jury, to highlight certain discrepancies in the evidence of the prosecution witnesses, his direction to the foreman and members of the jury that their verdict must be unanimous one way or the other, the effect of which was said to have cajoled the jury into the verdict of guilty, and his direction to the jury on the issue of the unsworn statements made by all four co-defendants. As stated above, the Court of Appeal dismissed the appeals on 16 March 1992.

2.8 The author's petition for special leave to appeal to the Judicial Committee of the Privy Council was based, inter alia, on the following grounds:

- that the trial judge erred in his direction to the jury by over-stressing the need for unanimity and failed to advise the jury adequately of their right and duty to disagree, thereby causing the jury to be pressured into arriving at a unanimous verdict; and

- that there was a material irregularity in the course of the trial in that although nine of the twelve jurors intended to acquit the author, the foreman wrongly and improperly announced that a unanimous verdict of guilty had been reached against the author.

2.9 It is stated that the grounds concerning the material irregularities during the course of the jury's deliberations and their need to reach a unanimous verdict were raised before the Privy Council.

The complaint

3.1 Counsel points out that, since his conviction on 25 April 1990, the author has been held on death row at St. Catherine District Prison. He submits that to execute the author now after this lengthy delay of over six years would be in violation of article 7 of the Covenant, in that the delay would render the execution cruel, inhuman and degrading treatment, as recognised in the cases of Pratt and Morgan v. the Attorney-General of Jamaica,[24] Catholic Commission for Justice and Peace in Zimbabwe v. the Attorney-General of Zimbabwe,[25] and Soering v. United Kingdom.[26] It is further submitted that the author has already been subjected to cruel, inhuman and degrading treatment or punishment by being held for such a substantial period of time in the appalling conditions that exist in the death row section of St. Catherine District Prison.

3.2 In respect of article 9, counsel refers to the delays in the judicial proceedings against the author, which are attributable to the State party. He points to the delay of nearly fourteen months between the date of the author's arrest (27 February 1989) and his trial (23 to 25 April 1990), a further delay of nearly twenty-three months between the date of conviction and sentence (25 April 1990) and the dismissal of his appeal (16 March 1992), and a further delay of nearly ten months between London solicitors accepting instructions to act on the author's behalf (13 May 1992) and the date of receipt of the trial transcript and written judgment of the Court of Appeal (8 March 1993), before it was possible to consider whether there were any grounds to appeal to the Judicial Committee of the Privy Council. In this context, counsel refers to his repeated requests to the Jamaican judicial authorities to provide him with the court documents in the author's case.

3.3 It is submitted that the author was held in police detention from the date of his arrest (27 February 1989) to the date of conviction and sentence (25 April 1990), and that, during this period, he was not segregated from convicted prisoners, nor was he subject to separate treatment appropriate to his status as an unconvicted person, in violation of article 10 of the Covenant. Furthermore, the author claims that, whilst in police detention, his right to receive visitors was interfered with, and he was badly beaten by police officers and threatened with further physical violence.

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[24] Privy Council Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

[25] Zimbabwe Supreme Court judgement No. S.C. 73/93, delivered on 24 June 1993.

[26] 1989, II EHRR 439.

3.4 Counsel claims that the author's right to a fair trial was violated in that there was a material irregularity in the course of the trial because, although nine of the twelve jurors intended to acquit the author, the foreman wrongly and improperly announced that a unanimous verdict of guilty had been reached against the author. In this context, counsel refers to the above-mentioned sworn affidavits of the two jurors. The failure of the Court of Appeal to accept and rectify the errors and omissions relating to the trial judge's direction to the jury that their verdict had to be unanimous one way or the other, is said to amount to grave and substantial injustice, in violation of article 14 of the Covenant.

3.5 It is further submitted that the trial judge violated his obligations of impartiality by over stressing to the jury the need for unanimity, and by failing to advise the jury adequately as to their right and duty to disagree. Counsel reiterates that the trial judge, by stating that under no circumstances would he be prepared to accept a majority verdict (contrary to what he implied when the jury returned for the first time, when he stated that he could not accept anything but a unanimous verdict at that stage), caused the jury to be pressured into accepting the unanimous verdict as read out by the foreman.

3.6 Counsel points out that the author's lawyer filed the grounds of appeal on 1 May 1990, and that it took the Court of Appeal twenty-two months to hear and dismiss the appeal. This is said to amount to a violation of article 14, paragraph 3 (c), of the Covenant.

3.7 Reference is made to the findings of the Committee that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have been breached constitutes, if no further appeal against sentence is available, a violation of article 6 of the Covenant. It is submitted that no further remedies are available to the author, and that, since the final sentence of death was passed without having met the requirements of the Covenant, article 6 has been violated in his case.

3.8 Finally, as to a violation of article 17, the author claims that his correspondence is repeatedly and unlawfully interfered with by the prison warders. In this respect, he claims that letters he has sent to the prison office have not reached the correct addressee.

State party's observations and counsel's comments thereon

4. By submission of 18 May 1995, the State party submitted comments on the merits of the communication in order to expedite the consideration of the case. However, the State party promised information regarding investigations to be carried out into several of the author's allegations, which have not been forthcoming.

5. On 28 July 1995, the author's counsel objected to the joint consideration of the admissibility and merits of the communication, as the State party had failed to address all the issues raised in the communication. However counsel forwarded comments on the State party's submission on those issues that had been addressed.

Committee's decision on admissibility

6.1 During the 58th session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee had ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 As to the requirement in article 5, paragraph 2 (b), of the Optional Protocol that domestic remedies be exhausted, the Committee noted that the Court of Appeal dismissed the author's appeal and that the Privy Council dismissed his application for leave to appeal. Therefore, with regard to the author's allegation that his trial was unfair because of the material irregularities in the deliberations of the jury, the way in which the verdict was reached and the trial judge's instructions to the jury telling them that they had to reach a unanimous verdict, the Committee was satisfied that domestic remedies had been exhausted for purposes of the Optional Protocol. The Committee further, considered that the allegations might raise issues under article 14 and consequently, of article 6, of the Covenant which needed to be examined on the merits.

6.4 With regard to the author's claim that his detention on death row amounts to a violation of articles 7 and 10 of the Covenant, the Committee referred to its prior jurisprudence that detention on death row does not *per se* constitute cruel, inhuman or degrading treatment in violation of articles 7 and 10 paragraph 1, of the Covenant, in the absence of some further compelling circumstances. The Committee observed that the author had not shown in what particular ways he was so treated as to raise an issue under articles 7 and 10 of the Covenant. This part of the communication was therefore inadmissible under article 2 of the Optional Protocol.

6.5 As to the claim of undue prolongation in the appeal proceedings, the Committee considered that the author and his counsel had sufficiently substantiated, for the purposes of admissibility, that the delay of twenty three months between his conviction and the dismissal of his appeal, might raise issues under article 14, paragraphs 3 (c) and 5 of the Covenant, which should be examined on the merits.

6.6 With regards to the author's allegation of ill-treatment while in pre-trial detention and his non-separation from convicted prisoners during this period, the Committee considered that the author's claim regarding his pre-trial detention might raise issues under article 10 of the Covenant, pending the outcome of the State party's investigations.

6.7 With regard to counsel's allegation that there has been an arbitrary interference with the author's mail, in violation of article 17, paragraph 1, the Committee considered that neither the author nor his counsel had sufficiently substantiated this claim for purposes of admissibility under article 2 of the Optional Protocol.

6.8 Consequently, on 17 October 1996 the Human Rights Committee declared that the communication was admissible in so far as it might raise issues under articles 6; 9, paragraph 3; 10; 14 paragraphs 1, 3 (c) and 5.

State party's observations on the merits and counsel's comments thereon

7.1 In a submission dated 6 June 1997, the State party informed the Committee it had been unable to investigate the author's allegation that he was beaten by a police officer, in the absence of additional information, such as the place where the author was held, the time at which the incidents allegedly occurred and if possible the name(s) of the officers involved. Until this information was received the State party would be unable to investigate the allegations.

7.2 With respect to the allegation that the author was not segregated from convicted prisoners while detained, the State party contends that since the author refers to "police detention" it must refer to a police station or remand facility for persons awaiting trial. Convicted offenders are not held in these facilities unless there has been a short delay in transferring them to a correctional institution. The committee is asked to note that in the parish in which the author was tried, Clarendon, there is no institution in which convicted persons can be detained without creating major security risks.

7.3 The State party denies any breach of the Covenant in respect of the 23 months delay between conviction and the dismissal of the appeal in violation of articles 14, paragraph 3 (c), and 14 paragraph 5, although it concedes that this period is longer than desirable.

7.4 With regard to the author's allegation that his trial was unfair because of the material irregularities in the deliberations of the jury, the way in which the verdict was reached and the trial judge's instructions to the jury telling them that they had to reach a unanimous verdict. The State party contends that with respect to the issue of the judge's instructions to the jury this has been received by two appellate courts. The State party further submits that the Committee's own jurisprudence on this subject is that it is for appellate courts to review such instructions, and only in particular circumstances will the Committee conduct a review. The State party considers that these particular circumstances as defined by the Committee do not arise in this case and therefore it asserts that this issue is not one over which the Committee should assume jurisdiction.

7.5 As to the question of jury deliberation and the manner in which the verdict was arrived at, the State party denies that this is a breach for which the State party can be held accountable. The jury members were clearly aware of their duty and obviously understood correctly the judge's instruction; they chose to disregard those instructions. They knew they were entitled to disagree if they felt strongly on the issue, but chose not to do so. To say that the State party is responsible because some jurors were tired and wanted to go home and therefore did not insist that they had reasonable doubts, is uncalled for. The jurors, were aware that a man was on trial and if convicted could lose his life. Their failure to discharge their duties according to their conscience and beliefs, having heard the evidence, cannot be laid at the door of the State. The State party further contends that the jury system is based on the presumption that having heard all the evidence with an open mind, those called on to do so will render a verdict in good faith according to their view of the evidence. Where persons choose not to do so for their own reasons, the fault does not lie with the State.

8. By submission dated 14 January 1998, counsel addressed several questions to the State party in respect of the observations he had submitted to the State party's admissibility submission. He requested confirmation that a preliminary enquiry had taken place, additional information in respect of when Mr. Thomas was brought before a judge and the establishment of a prima face case against the author. He also requested information in respect of the investigations the State party claimed it was carrying out in respect of the author's allegations of beatings and having been held in detention with convicted prisoners while awaiting his own trial. He also requested clarification in respect of what the State party's means when it states that in the parish where the author was kept there is no facility for keeping convicted persons.

Examination of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The author has put forward two complaints in respect article 10 of the Covenant, a) ill-treatment while in police detention and, b) non segregation from convicted prisoners while in police detention. The Committee notes that the author's allegations in respect of the treatment he was subjected to while in police detention are very vague (see paragraph 3.3 supra), and considers that it is incumbent upon an alleged victim to provide sufficient information, in order that a State party may investigate an allegation. In this respect, the Committee also notes that the State party did in fact request additional information in order to investigate the claims. In the Committee's opinion, the information provided by the author and his counsel in respect of the conditions described in paragraph 3.3. are insufficient for a State party to be able to adequately investigate the matter. Consequently, the Committee considers that neither the author nor his counsel have sufficiently substantiated a claim under article 3 of the Covenant in respect to the alleged violation of article 10 paragraph 1.

9.3 The author has claimed that he was not separated from convicted prisoners while in police detention, however no further substantiation has been provided in this respect. The Committee notes the State party's information that in the parish in which the author was tried there is no institution capable of holding convicted prisoners. The Committee considers that the author's claim has not been sufficiently substantiated and given the State party's denial, and on the basis of the information before it. The Committee is unable to find that there has been a violation of article 10, paragraph 2.

9.4 The issue before the Committee in respect to article 14 is whether the judge's insistence that the jury must reach a unanimous verdict and the alleged material irregularities in the jury's deliberations constituted a violation of the Covenant. The Committee observes that the issue of the judge's summing up to the jury and his emphasis that the jury reach a unanimous verdict was examined by the Court of Appeal of Jamaica and the Judicial Committee of the Privy Council, and that both instances found the instructions to be acceptable. It is not for the Committee to review the findings of these bodies in the absence of any indication that their conclusions were arbitrary or otherwise amounted to a denial of justice. Consequently, there has been no violation of article 14 of the Covenant.

9.5 The author has claimed that the period of 23 months from his conviction to the hearing of his appeal constitutes a breach of article 14, paragraph 3 (c), and 5, of the Covenant. The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, particularly in capital cases, and notes with regard to the period of 23 months between trial and appeal that the State party has conceded that such a delay is undesirable, but that it has not offered any further explanation. In the absence of any circumstances justifying the delay, the Committee finds that with regard to this period there has been a violation of article 14, paragraph 3 (c), in conjunction with paragraph 5, of the Covenant.

9.6 However, with regard to the period of nearly fourteen months which lapsed from the author's arrest (27 February 1989) to his trial (23 to 25 April 1990), the Committee notes that the State party has not addressed the issue, nonetheless it considers that this delay does not in the overall circumstances of the case constitute a violation of article 9, paragraph 3.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 3 (c), and 5, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Samuel with an effective remedy, entailing compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion Hipólito Solari Yrigoyen
(dissenting)

The following is the Committee member's version of how paragraphs 6.4 and 9.4 of the decision should have read.

6.4 The author's lawyer has maintained that his detention on death row in St. Catherine District Prison constitutes cruel and inhuman treatment, both because of the time spent there and because of the general conditions of detention, which he describes as "frightful" in paragraph 3.1. In this connection it should be pointed out that although, in accordance with the Committee's jurisprudence, time is not a factor which causes the detention to constitute a violation of the Covenant, this is not the case with conditions of detention. In the present case the State has not refuted the specific allegations about the treatment received by the author in breach of article 7 and article 10, paragraph 1, of the Covenant and it has not provided any information on this point, despite the obligation imposed on it by article 4, paragraph 2, of the Optional Protocol. Moreover, in the present case the State party has not fulfilled its obligation to indicate whether the prison regime and the treatment of the detainee are in conformity with the provisions of article 10 of the Covenant. Because of these significant circumstances the complaint should be upheld. The Committee considers that the author has been the victim of cruel treatment denying him the respect due to the inherent dignity of a human being, in breach of the provisions of the International Covenant on Civil and Political Rights already mentioned in this paragraph.

9.4 The author's counsel considers that his right to a fair trial was violated, in contravention of article 14 of the Covenant. He claims in paragraph 3.4 that the jury foreman committed a "material irregularity" by announcing a unanimous guilty verdict when no such verdict had been reached, and in paragraph 3.5 he argues that the trial judge violated his obligation of impartiality by overstressing to the jury the need for unanimity, without advising the members of the jury about their right and duty to disagree, and by stating that under no circumstances would he be prepared to accept a majority verdict. The State party points out that it could not be held responsible if the members of the jury did not do their duty in accordance with their conscience and beliefs, having heard the evidence and accordingly denies that there was a violation attributable to it. It contends that if, for their own personal reasons, the members of the jury do not render a verdict in good faith in accordance with their view of the evidence the fault does not lie with the State. Notwithstanding these arguments, it must be pointed out that it is the State's responsibility to provide for competent, independent and impartial courts of justice established by law to produce a determination of any criminal charge, in accordance with article 14 of the Covenant.

The sworn statements of jury members Terence Douglas and Daphne Harrison, brought to the Committee's attention by the author's counsel and not rebutted by the State party, show that the foreman acted irregularly by pressuring the members of the jury to deliver a unanimous verdict, when nine of them believed that the author was not guilty and only three believed the opposite, and that moreover the change made in the announcement of the verdict shows that the author did not enjoy the due process accorded to defendants in criminal cases by article 14 of the Covenant. This circumstance is particularly serious in view of the fact that the verdict announced as having been reached by the jury amounts to a death sentence for the convicted person. The confirmation of the verdict by the Appeal [illegible] supports the view that the accused did not have a fair trial. In the Committee's opinion, the irregularities described above constitute a violation of the rights contained in article 14 of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 616/1995, Hamilton v. Jamaica (Views adopted on 23 July 1999, sixty-sixth session)*

Submitted by:	Zephiniah Hamilton (represented by counsel of the London law firm Macfarlanes)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	6 January 1995
Date of decision on admissibility:	7 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Having concluded its consideration of communication No. 616/1995 submitted to the Human Rights Committee by Mr. Zephiniah Hamilton under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Zephiniah Hamilton, a Jamaican citizen who at the time of submission of his communication was awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 9, paragraph 3; 10 and 14, paragraphs 1, 3 (c) and 5, of the International Covenant on Civil and Political Rights. He is represented by a counsel of the London law firm, Macfarlanes. The author's death sentence has been commuted.

The facts as submitted by the author

2.1 The author was arrested on 28 March 1989 and charged with the murders of Lynval Henry and Robert Bell, which had occurred on 13 October 1988. The preliminary enquiry was held in May 1990. On 24 December 1991, the author was found guilty as charged and sentenced to death. The Court of Appeal of Jamaica dismissed his appeal on 12 October 1992. A further application for special leave to appeal to the Judicial Committee of the Privy Council has not been filed and there has been no appeal to the Supreme (Constitutional) Court of Jamaica.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah,

2.2 The author was convicted by the jury of murder as being part of a joint enterprise; the two victims were attacked in the evening, in the presence of two other men, one of whom gave evidence that he recognised the author, as a person known to him from childhood, and the other of whom said that he had seen the author on previous occasions. The author's defence, based on an alibi and mistaken identity (supported by an unsworn statement) was rejected by the jury.

2.3 At the time of the original communication the author was under sentence of death. His appeal to the Court of Appeal of Jamaica was dismissed two days before the Offences against the Persons (Amendment) Act 1992 came into force; the communication also included a detailed submission about the classification procedure under that Act, leading to a complaint of violations of articles 6 and 14 paragraph 1, and 5, of the Covenant, with full supporting argument. The commutation of the author's sentence by the Governor-General has made it unnecessary to deal with these issues in detail.

The complaint

3.1 Counsel explains that the author was shot, in the lower area of his spine by a police officer after a hearing by the Magistrate as part of the Preliminary Enquiry. He had, for other reasons, been in hospital prior to his arrest. He was then readmitted to hospital, because of the injury to his back, where he spent three months between his arrest and his trial. As a long term outcome, as a result of this, he is paralysed in both legs and is unable to move from his cell unless he is carried by other inmates. He is also unable to remove his slop bucket from the cell himself and he has therefore been obliged to pay other inmates to remove it. This means that sometimes it has to remain in his cell until he has obtained the necessary funds. The author complained several times to the superintendent about the conditions in which he is kept, to no avail. Furthermore, the London solicitors wrote twice to the Prison Governor on Mr. Hamilton's behalf, requesting him to ensure that the author is given proper assistance to enable him to leave his cell for some period during each day, and also to make proper arrangements for his slop bucket to be removed from his cell daily. To date no reply has been received. Counsel refers to a 1993 report from a non-governmental organisation in which it is stated that, although the Parliamentary Ombudsman seems to make a genuine effort to address the problems in the prisons of Jamaica, his office does not have sufficient funding to be effective, and the Ombudsman has no powers of enforcing his recommendations which are non-binding. Therefore, counsel argues, the office of the Parliamentary Ombudsman does not provide an effective remedy in the circumstances of the author's case. It is submitted that the author's rights under articles 7 and 10 of the Covenant have been violated, because of the prison authorities' failure to take into account the author's paralysed condition and to make proper arrangements for him. The lack of proper care is also said to be in violation of the UN Standard Minimum Rules for the treatment of Prisoners.

3.2 Counsel points out that the author was arrested on 28 March 1989, but was not tried until 24 December 1991, and that it took a further ten months before his appeal was heard and dismissed. The delay of thirty-three months between arrest and conviction is said to amount to a violation of articles 9, paragraph 3, and 14, paragraph 3 (c).

4. On May 11, 1995 the communication was transmitted to the State party, with a request to submit to the Committee information and observations in respect of the admissibility of the communication. As of July 1997 no reply had been received.

Committee's decision on admissibility

5.1 During its 60th session the Committee considered the admissibility of the communication.

5.2 The Committee noted with concern the absence of co-operation from the State party on the matter under consideration. In particular, it observed that the State party had failed to provide information on the question of admissibility of the communication. On the basis of the information before it the Committee found that it was not precluded from considering the communication under article 5, paragraph 2 (a), of the Optional Protocol.

5.3 The Committee noted that the State party had not contested the admissibility of the author's allegations about the conditions of his detention at St. Catherine District Prison which have been aggravated by his handicap. In the circumstances, the Committee found that the author and his counsel had met the requirements of article 5, paragraph 2 (b), of the Optional Protocol in this respect, and made no finding about the complaint under articles 6 and 14, paragraphs 1, and 5 (as having been overtaken by the commutation of the death sentence), but considered that the allegations might raise issues under articles 10, paragraph 1 and also articles 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant.

States party's observations on the merits and counsel's comments

6.1 In a submission dated 28 September 1998, the State party informed the Committee that with respect to the allegation of violations of article 9, paragraph 3, and article 14, paragraph 3, (c) due to the delays between arrest and trial and trial and appeal, it denied that those periods were so prolonged as to constitute undue delay, since a preliminary enquiry was held over several sessions between arrest and trial thereby mitigating any potential delay.

6.2 With regard to the alleged breach of article 10 , paragraph 1, due to the circumstances of the author's detention and the difficulties he is experiencing because of his disability, the State party contends that since the author is no longer on death row the conditions in which he is now detained will facilitate his movements more effectively. This is subject to the fact that the prison is not designed to accommodate disabled persons, therefore special arrangements have to be put in place to assist these persons.

6.3 The State party also responded to points concerning the classification process.

7.1 By submission dated 22 December 1998, counsel reiterates his affirmation that articles 9, paragraph 3, and 14, paragraph 3, (c) have been violated since there was a 33 month delay between the author's arrest and his trial, he rejects the State party's contention that a preliminary enquiry heard within that period mitigates any "potential delay".

7.2 Counsel has provided a copy of the "report of investigation" in respect of the author's complaint against special constable Mendez, which reflects contradictory versions of the shooting incident in which the author was injured. It also contains a note from the Police Public Complaints Authority recommending that proceedings be initiated against Special Constable Mendez for wounding with intent.

7.3 With regard to the State party's information that since the author is no longer on death row and that therefore the conditions of his detention have improved, counsel argues that the author continues to need someone to clean [illegible] him and since what money he had was confiscated by a prison guard he is in an untenable position. Counsel reiterates that the author does not receive a low fat diet as prescribed by the doctor. He also points out the author's fear of being transferred to the prison hospital since he could become the victim of a homosexual assault and his disability would impede him from defending himself.

7.4 Furthermore, counsel reaffirms that no special arrangements have been put in place to accommodate the author in prison. In this respect he points out that since the author's disability is so severe that he will never present a threat to society he should be transferred to a rehabilitation centre.

Examination of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

8.2 With regard to the author's complaints with respect to his conditions of detention at St. Catherine's District Prison, the Committee notes that the author has made very precise allegations, relating to the difficulties he has encountered as a disabled person (see paragraph 3.1 supra). All of this has not been contested by the State party, except to say that measures would have to be put in place to accommodate the author as a disabled person in prison. In the Committee's opinion, the conditions described in para 3.1, are such as to violate the author's right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1.

8.3 The author has claimed a violation of articles 9, paragraph 3, and 14 paragraph 3 (c) in that he was not tried without undue delay, since there were 33 months between the author's arrest on 28 March 1989 and his trial on 24 December 1991. The Committee notes that the State party contends that since a preliminary hearing was held in that period this constituted a mitigating circumstance and consequently rejects any violation of the Covenant. Nevertheless, the Committee is of the view that the mere affirmation that a delay does not constitute a violation is not sufficient explanation. The Committee therefore finds that 33 months between arrest and trial does not comply with the minimum guarantees required by the Covenant. Consequently, and in the circumstances of the case the Committee finds that there has been a violation of articles 9, paragraph 3 and 14, paragraph 3 (c).

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1, 9, paragraph 3, and 14, paragraph 3 (c), of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Hamilton with an effective remedy, entailing compensation and placement in conditions that take full account of his disability. The State party is under an obligation to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the

Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 618/1995, Campbell v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Barrington Campbell (represented by Mr. George Brown from Nabarro Nathanson, a law firm in London)
Victim:	The author
State party:	Jamaica
Date of communication:	10 January 1995 (initial submission)
Date of decision on admissibility:	20 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No. 618/1995 submitted to the Human Rights Committee by Mr. Barrington Campbell, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Barrington Campbell, a Jamaican citizen at the time of submission awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7, 10, paragraph 1, and 14, paragraphs 3(b)(d) and (e), of the International Covenant on Civil and Political Rights. He is represented by George Brown of Nabarro Nathanson, a law firm in London.

Facts as submitted by the author

2.1 The author was taken into custody on 30 March 1989. On 12 April 1989, he was put on an identification parade and he was subsequently arrested and charged with the murder, on 23 March 1989, of one Paul Vassell. The preliminary enquiry was held in early July 1989. On 8 March 1990, the author was found guilty as charged and sentenced to death in the Kingston Home Circuit Court. On 13 March 1990, he applied for leave to appeal against conviction and sentence. While treating the application for leave to appeal as the hearing of the appeal, the Court of Appeal of Jamaica dismissed the appeal on 27 April 1992; the written judgment was made available on 17 February 1993. A further petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 12 December 1994. With this, it is submitted, all domestic remedies have been exhausted. The author's death sentence was commuted to life imprisonment in 1995.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin,

2.2 The case for the prosecution was that, on 23 March 1989, at approximately 7:00 p.m., after having attended a meeting at the Seventh Day Baptist Church in Kingston, Paul Vassell took a machete out of his car and re-entered the premises of the church together with eye-witness Karl Bowen and two other men. The four men walked along a passage-way to the rear of the church, where they were approached by two men, who ordered them to put their hands up, and asked for their money. Mr. Bowen testified during the trial that he observed a man, whom he later identified as the author, armed with a shotgun. He complied with the order while his two companions ran off. However, Mr. Vassell, who was holding the machete, attacked the gunman alleged to be the author, who retreated in the passage-way. While Mr. Bowen was held at gun point by the author's companion, the author and Mr. Vassell moved out of sight, the latter still chopping at his assailant. Mr. Bowen further testified that he then heard someone screaming, the sound of running feet and of a shotgun, and that the author re-appeared still carrying his shotgun and with his left hand bleeding. Mr. Bowen was told to run and as he made his escape he came across the body of Mr. Vassell, lying at the entrance to the church in a pool of blood.

2.3 A police officer testified that the author's left thumb was bandaged when he was taken into custody on 30 March 1989. Furthermore, the investigating officer testified that, after having cautioned him on 10 April 1989, the author admitted that he had shot the deceased. Further evidence against the author was the fact that, at an identification parade held on 12 April 1989, Mr. Bowen picked him out as one of the participants in the robbery.

2.4 The defence was based on alibi and mistaken identity. The author made a sworn statement, testifying that at the time of the incident he was on his way to his then girlfriend's home at Seaforth, in the parish of St. Thomas, and that he had injured his hand when chopping a coconut.

2.5 In respect of the author's then girlfriend, Norma Lewis, one of the police officers testified during the trial that he had taken a statement from her on 7 April 1989. It appears from the trial transcript that at the preliminary enquiry, Miss Lewis' statement was submitted as part of the prosecution's case, but that the prosecution later decided not to call her. It further appears that on 26 February 1990, the author's attorney requested the judge to adjourn the trial and asked for Norma Lewis to be subpoenaed. The trial was then adjourned and the witness subpoenaed. She appeared late on the first day of the trial, and had left before counsel had a chance to speak to her. On the second and last day of the trial, after the close of the prosecution's case, the attorney again sought an adjournment for 15 minutes because he had not had a chance to interview the witness, and the author had instructed him to do so. The hearing was adjourned from 12:15 p.m. to 1:25 p.m.; upon resumption, the author gave his sworn evidence and no further mention is made of Miss Lewis.

2.6 The trial transcript further reveals that the attorney who represented the author at trial had also assisted him during the identification parade upon the author's request. On appeal, the author was represented by two different attorneys. Although they argued only one ground of appeal on the author's behalf (relating to the issue of provocation), the Court of Appeal, taking into account the nature of the case, also considered the visual identification evidence and the trial judge's directions thereon.

The complaint

3.1 As to a violation of article 7 of the Covenant, counsel points out that Mr. Campbell has been on death row for almost five years. With reference to the decision of the Judicial Committee of the Privy Council in the case of Earl Pratt and Ivan Morgan v. The Attorney-General for Jamaica,[27] it is submitted that the "agony of suspense" resulting from such long awaited and expected death amounts to cruel, inhuman and degrading treatment.

3.2 As to a further violation of article 7, and of article 10, paragraph 1, of the Covenant, counsel refers to the reports of non-governmental organisations concerning the conditions of detention at St. Catherine District Prison. In this context, it is submitted that the prison is holding more than twice the capacity for which it was constructed in the 19th century; that the facilities provided by the State are scant: no mattresses, other bedding or furniture in the cells; no integral sanitation in the cells; broken plumbing, piles of refuse and open sewers; no artificial lighting in the cells and only small air vents through which natural light can enter; almost no employment available to inmates; and no doctor attached to the prison so that medical problems are generally treated by warders who receive very limited training. The particular impact of these general conditions upon Mr. Campbell are said to be that he is confined to his cell for twenty-two hours of each and every day; that his cell is very small, dirty and infested with rats and cockroaches; that he spends most of his time isolated from other men, with nothing whatsoever to keep him occupied, and that much of his time is spent in enforced darkness.

3.3 Counsel further refers to article 36 of the UN Standard Minimum Rules for the Treatment of Prisoners, and submits that due to the constant fear of reprisals from warders, it is extremely difficult and risky for inmates to complain about ill-treatment. In this context, the author claims in a letter addressed to London counsel, dated 7 March 1994, that "[...] I am not safe at any time [...] over the years they (the warders) have killed a lot of death row inmates. In 1988, they kill one, in 1990 they kill three and last year they kill four at Constant Spring Police Station and seeing that what I saw happen on the 31 October and I gave a written statement to the police so that alone make me more vulnerable to these warders [...] my life is threatened mostly because I am a witness against the warders".

3.4 On 18 April 1994, counsel wrote to the Parliamentary Ombudsman and to the Commissioner of Corrections, requesting an investigation into the author's allegations and an undertaking that he will be protected from such threats and attacks in the future. In spite of a reminder, the Ombudsman never replied, and the Commissioner of Corrections merely informed counsel, by letter of 27 April 1994, that: "It is clear to all correctional officers that excessive force, threats and brutality is not condoned, and if and when this is found, the strongest disciplinary action is taken". On 19 May 1994, counsel requested the Commissioner of Corrections what measures had been taken in respect of Mr. Campbell's case, to which he again received a reply in general terms.

3.5 Counsel submits that he and the author made all reasonable efforts to seek redress in respect of the ill-treatment suffered by the author, and that the domestic complaints process, and in particular the internal prison process, is not an available nor an effective remedy in the author's case.

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[27] Privy Council Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

3.6 As to the preparation of the author's defence at trial, it is stated that the attorney was assigned to the author through legal aid. According to counsel, it is clear that the attorney had not seen the author in conference before the start of the trial, had taken no instructions on the statements of the prosecution witness, and failed to interview an alibi witness.

3.7 In this context, it is submitted that the evidence Miss Norma Lewis could have given would have confirmed the author's alibi, i.e. that he was in Seaforth, a town some seven to eight miles away from Kingston, and that he was there from 8:00 p.m. onwards, whereas the shooting took place around 7:00 p.m. The attorney's failure or refusal to call Miss Lewis as a witness, in spite of the relevance and importance of her evidence, is said to amount to a violation of article 14, paragraphs 3(b) and (e).

3.8 In respect of violations of article 14, paragraph 3(d), the author claims that prior to the identification parade he was taken to the CID office on two occasions with the possibility that he was seen by Mr. Bowen. It is submitted that his attorney failed to cross-examine properly the officer who conducted the identification parade as to the author's movements prior to the parade, and failed to cross-examine Mr. Bowen adequately or at all on this point. Counsel concludes that the way in which the identification parade was conducted was not in accordance with the Jamaica Constabulary Force Act 1939 and its 1977 amendment.

3.9 It is further submitted that the author's attorney failed to cross-examine the investigating officers adequately or consistently as to whether the alleged admission by the author was ever made or whether it was made as a result of oppression.

3.10 Finally, it is submitted that the attorney failed to examine in chief the author about the alleged admission and the circumstances that gave rise to it. The author's rights under article 14, paragraph 3(d), are further said to have been violated by the two legal aid attorneys who represented him on appeal, since they allegedly failed to discuss the case with him prior to the hearing, and therefore did not take his instructions. In this context, reference is made to the Committee's findings in communication No. 356/1989 (Trevor Collins v. Jamaica),[28] and to the case of R. v. Clinton, where counsel's decision not to call the defendant or witnesses to rebut identification evidence resulted in the conviction being quashed.[29]

State party's submission and counsel's comments

4.1 In its observations, the State party does not raise any objection to admissibility and offers comments on the merits of the communication, in order to expedite the consideration of the case.

4.2 With regard to the claim that there is a violation of article 7 of the Covenant, because of the length of time spent on death row, the State party points out that a reasonable length of time must be allowed for the exhaustion of domestic remedies by a convicted person, including the hearing of appeals as well as hearings by international human rights bodies. The State party takes the view that the time spent on death row while the author was exhausting his appeals is not unreasonable, and argues that it should not be held in violation of article 7 because it allows a convicted person to exhaust all available remedies before the sentence of death is carried out.

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[28] Views adopted on 25 March 1993, at the Committee's forty-seventh session, para. 8.2.

[29] (1993) 2 ALL ER.

4.3 Concerning the conditions of detention in St. Catherine District Prison, the State party asserts that efforts are being made to improve the conditions. It refers to a report by the Inter-American Commission on Human Rights following a visit to Jamaican prisons in December 1994.

4.4 In respect of the way the author's attorney conducted the defence, the State party points out that all issues relating to the preparation and handling of a case fall within the ambit of the relationship between an attorney and his client. The State does not interfere in the conduct of the defence by counsel for the accused. A decision on whether or not to call a witness is a matter of judgement for counsel and decisions made by counsel in his best judgement cannot engage the responsibility of the State. Likewise, in respect of the allegation that the author had no time to prepare his defence, the State party asserts that there was no act or omission on its part to prevent him and his counsel from preparing the case adequately. The State party therefore denies any breaches of article 14 (3)(b) and (e).

4.5 With regard to the author's claim under article 14 (3) (d), because he did no see his counsel before the hearing of the appeal, the State party submits that there is no evidence that counsel withdrew any grounds or argued that the appeal had no merit. According to the State party, the conduct of the appeal is a matter between counsel and his client. The State party denies that there has been a breach of article 14 (3)(d).

5.1 In his comments on the State party's submission, counsel argues that the Privy Council's ruling in Pratt & Morgan applies to the author, since the author has been on death row for over 5 years.

5.2 In respect of the conditions of detention, counsel notes that the State party has not challenged the author's description of the conditions.

5.3 With regard to counsel's conduct of the defence at trial or on appeal, it is argued that the State party must bear the responsibility for the conduct of counsel, since it provides legal aid at such a low rate of remuneration that the defence is inadequately resourced and counsel who accept instructions in capital cases are under such intense pressure of work that they cannot properly or adequately represent their clients.

5.4 Counsel has no objection to the Committee considering both admissibility and merits at this stage.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has forwarded comments on the merits of the communication and that it has not challenged the admissibility of the communication. The Committee considers the communication admissible and proceeds, without further delay, to an examination of the substance of the claims in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 The author has claimed that his continued detention on death row in itself, as well the conditions of this detention, constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. The Committee reaffirms its constant jurisprudence that detention on death row for a specific period - in this case for about five years before the sentence was commuted - does not violate the Covenant in the absence of further compelling circumstances.

7.2 Mr. Campbell also alleges that he is detained in particularly bad and insalubrious conditions on death row. There is lack of sanitation, light, ventilation and bedding. He is in his cell 22 hours a day, his cell is infested with rats and cockroaches, and he is isolated from others. Furthermore, the author has claimed that he has been threatened by warders and that the State party has taken no measures to protect him. The author's claims have not been refuted by the State party. The Committee considers that the conditions of detention described by the author and his counsel are such as to violate Mr. Campbell's right to be treated with humanity and respect for the inherent dignity of his person, and are thus contrary to article 10, paragraph 1.

7.3 The author has claimed that the bad quality of the defence put forward by his counsel at trial resulted in depriving him of a fair trial. Reference has been made in particular to counsel's alleged failure to interview the author's girlfriend, and to his alleged failure to cross-examine properly the prosecution witnesses in relation to the conduct of the identification parade and in relation to the author's alleged oral statement. The Committee recalls its jurisprudence that the State party cannot be held accountable for alleged errors made by a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. The material before the Committee does not show that this was so in the instant case and consequently, there is no basis for a finding of a violation of article 14, paragraph 3(b) (d) and (e), in this respect.

7.4 With regard to counsel's claim that the author was not effectively represented on appeal, the Committee notes that the author's legal representatives on appeal argued grounds for appeal. The Committee recalls its jurisprudence that under article 14, paragraph 3(d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. In the instant case, nothing in the conduct of the appeal by the author's representatives shows that they were exercising other than their professional judgement, in the interest of their client. Accordingly, the Committee concludes that the information before it does not show a violation of article 14, paragraph 3(d), in respect to the author's appeal.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1, of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Barrington Campbell with an effective remedy, including compensation. The State party is under an obligation to take measures that similar violations not occur.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

K. Communication No. 628/1995, Tae Hoon Park v. Republic of Korea (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Tae Hoon Park (represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul)
Victim:	The author
State party:	Republic of Korea
Date of communication:	11 August 1994
Date of decision on admissibility:	5 July 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No. 628/1995 submitted to the Human Rights Committee by Tae Hoon Park, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Tae-Hoon Park, a Korean citizen, born on 3 November 1963. He claims to be a victim of a violation by the Republic of Korea of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26 of the Covenant. He is represented by Mr. Yong-Whan Cho of Duksu Law Offices in Seoul. The Covenant and the Optional Protocol thereto entered into force for the Republic of Korea on 10 July 1990.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zahkia.

The facts as submitted by the author

2.1 On 22 December 1989, the Seoul Criminal District Court found the author guilty of breaching paragraphs 1 and 3 of article 7 of the 1980 National Security Law[30] and sentenced him to one year's suspended imprisonment and one year's suspension of exercising his profession. The author appealed to the Seoul High Court, but in the meantime was conscripted into the Korean Army under the Military Service Act, following which the Seoul High Court transferred the case to the High Military Court of Army. The High Military Court, on 11 May 1993, dismissed the author's appeal. The author then appealed to the Supreme Court, which, on 24 December 1993, confirmed the author's conviction. With this, it is argued, all available domestic remedies have been exhausted. In this context, it is stated that the Constitutional Court, on 2 April 1990, declared that paragraphs 1 and 5 of article 7 of the National Security Law were constitutional. The author argues that, although the Court did not mention paragraph 3 of article 7, it follows from its decision that paragraph 3 is likewise constitutional, since this paragraph is intrinsically woven with paragraphs 1 and 5 of the article.

2.2 The author's conviction was based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois in Chicago, USA, in the period 1983 to 1989. The YKU is an American organization, composed of young Koreans, and has as its aim to discuss issues of peace and unification between North and South Korea. The organization was highly critical of the then military government of the Republic of Korea and of the US support for that government. The author emphasizes that all YKU's activities were peaceful and in accordance with the US laws.

2.3 The Court found that the YKU was an organization which had as its purpose the commission of the crimes of siding with and furthering the activities of the North Korean Government and thus an "enemy-benefiting organization". The author's membership in this organization constituted therefore a crime under article 7, paragraph 3, of the National Security Law. Moreover, the author's participation in demonstrations in the USA calling for the end of US' intervention constituted siding with North Korea, in violation of article 7, paragraph 1, of the National Security Law. The author points out that on the basis of the judgment against him, any member of the YKU can be brought to trial for belonging to an "enemy-benefiting organization".

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[30] The National Security Law was amended on 31 May 1991. The law applied to the author, however, was the 1980 law, article 7 of which reads (translation provided by the author):

> "(1) Any person who has benefited the anti-State organization by way of praising, encouraging, or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organisation, shall be punished by imprisonment for not more than 7 years.
>
> ...
>
> "(3) Any person who has formed or joined the organisation which aims at committing the actions as stipulated in paragraph 1 of this article shall be punished by imprisonment for more than one year.
>
> ...
>
> "(5) Any person who has, for the purpose of committing the actions as stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, possessed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph."

2.4 From the translations of the court judgments in the author's case, submitted by counsel, it appears that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions.

2.5 It is stated that the author's conviction was based on his forced confession. The author was arrested at the end of August 1989 without a warrant and was interrogated during 20 days by the Agency for National Security Planning and then kept in detention for another 30 days before the indictment. The author states that, although he does not wish to raise the issue of fair trial in his communication, it should be noted that the Korean courts showed bad faith in considering his case.

2.6 Counsel submits that, although the activities for which the author was convicted took place before the entry into force of the Covenant for the Republic of Korea, the High Military Court and the Supreme Court considered the case after the entry into force. It is therefore argued that the Covenant did apply and that the Courts should have taken the relevant articles of the Covenant into account. In this connection, the author states that, in his appeal to the Supreme Court, he referred to the Human Rights Committee's Comments after consideration of the initial report submitted by the Republic of Korea under article 40 of the Covenant (CCPR/C/79/Add.6), in which the Committee voiced concern about the continued operation of the National Security Law; he argued that the Supreme Court should apply and interpret the National Security Law in accordance with the recommendations made by the Committee. However, the Supreme Court, in its judgment of 24 December 1993, stated:

> "Even though the Human Rights Committee established by the International Covenant on Civil and Political Rights has pointed out problems in the National Security Law as mentioned, it should be said that NSL does not lose its validity simply due to that. ... Therefore, it can not be said that punishment against the defendant for violating of NSL violates international human rights regulation or is contradictory application of law without equity." (translation by author)

The complaint

3.1 The author states that he has been convicted for having opinions critical of the situation in and the policy of South Korea, which are deemed by the South Korean authorities to have been for the purpose of siding with North Korea only on the basis of the fact that North Korea is also critical of South Korean policies. The author argues that these presumptions are absurd and that they prevent any freedom of expression critical of government policy.

3.2 The author claims that his conviction and sentence constitute a violation of articles 18, paragraph 1, 19, paragraphs 1 and 2, and 26, of the Covenant. He argues that although he was convicted for joining an organization, the real reason for his conviction was that the opinions expressed by himself and other YKU members were critical of the official policy of the South Korean Government. He further contends that, although freedom of association is guaranteed under the Constitution, the National Security Law restricts the freedom of association of those whose opinions differ from the official government policy. This is said to amount to discrimination in violation of article 26 of the Covenant. Because of the reservation made by the Republic of Korea, the author does not invoke article 22 of the Covenant.

3.3 The author requests the Committee to declare that his freedom of thought, his freedom of opinion and expression and his right to equal treatment before the law in exercising freedom of association have been violated by the Republic of Korea. He further requests the Committee to instruct the Republic of Korea to repeal paragraphs 1, 3 and 5, of article 7 of the National Security Law, and to suspend the application of the said articles while their repeal is before the National Assembly. He further asks to be granted a retrial and to be pronounced innocent, and to be granted compensation for the violations suffered.

State party's observations and counsel's comments

4.1 By submission of 8 August 1995, the State party recalls that the facts of crime in the author's case were, inter alia, that he sympathized with the view that the United States is controlling South Korea through the military dictatorship in Korea, along with other anti-state views.

4.2 The State party argues that the communication is inadmissible for failure to exhaust domestic remedies. In this context, the State party notes that the author has claimed that he was arrested without a warrant and arbitrarily detained, matters for which he could have sought remedy through an emergency relief procedure or through an appeal to the Constitutional Court. Further, the State party argues that the author could demand a retrial if he has clear evidence proving him innocent or if those involved in his prosecution committed crimes while handling the case.

4.3 The State party further argues that the communication is inadmissible since it deals with events that took place before the entry into force of the Covenant and the Optional Protocol.

4.4 Finally, the State party notes that on 11 January 1992 an application was made by a third party to the Constitutional Court concerning the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law. The Constitutional Court is at present reviewing the matter.

5.1 In his comments on the State party's submission, counsel for the author notes that the State party has misunderstood the author's claims. He emphasizes that the possible violations of the author's rights during the investigation and the trial are not at issue in the present case. In this context, counsel notes that the matter of a retrial has no relevance to the author's claims. He does not challenge the evidence against him, rather he contends that he should not have been convicted and punished for these established facts, since his activities were well within the boundaries of peaceful exercise of his freedom of thought, opinion and expression.

5.2 As regards the State party's argument that the communication is inadmissible ratione temporis, counsel notes that, although the case against the author was initiated before the entry into force of the Covenant and the Optional Protocol, the High Military Court and the Supreme Court confirmed the sentences against him after the date of entry into force. The Covenant is therefore said to apply and the communication to be admissible.

5.3 As regards the State party's statement that the constitutionality of article 7, paragraphs 1 and 3, of the National Security Law, is at present being reviewed by the Constitutional Court, counsel notes that the Court on 2 April 1990 already decided that the articles of the National Security Law were constitutional. Later applications concerning the same question were equally dismissed by the Court. He therefore argues that a further review by the Constitutional Court is devoid of chance, since the Court is naturally expected to confirm its prior jurisprudence.

Committee's decision on admissibility

6.1 At its 57th session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the State party's argument that the communication was inadmissible since the events complained of occurred before the entry into force of the Covenant and its Optional Protocol. The Committee noted, however, that, although the author was convicted in first instance on 22 December 1989, that was before the entry into force of the Covenant and the Optional Protocol thereto for Korea, both his appeals were heard after the date of entry into force. In the circumstances, the Committee considered that the alleged violations had continued after the entry into force of the Covenant and the Optional Protocol thereto and that the Committee was thus not precluded *ratione temporis* from examining the communication.

6.3 The Committee also noted the State party's arguments that the author had not exhausted all domestic remedies available to him. The Committee noted that some of the remedies suggested by the State party related to aspects of the author's trial which did not form part of his communication to the Committee. The Committee further noted that the State party had argued that the issue of the constitutionality of article 7 of the National Security Law was still pending before the Constitutional Court. The Committee also noted that the author had argued that the application to the Constitutional Court was futile, since the Court had already decided, for the first time on 2 April 1990, and several times since, that the article was compatible with the Korean Constitution. On the basis of the information before it, the Committee did not consider that any effective remedies were still available to the author within the meaning of article 5, paragraph 2(b), of the Optional Protocol.

6.4 The Committee ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

6.5 The Committee considered that the facts as submitted by the author might raise issues under articles 18, 19 and 26 of the Covenant that need to be examined on the merits.

7. Accordingly, on 5 July 1996 the Human Rights Committee decided that the communication was admissible.

State party's observations concerning the merits and counsel's comments thereon

8.1 In its observations, the State party notes that the author has been convicted for a transgression of national laws, after a proper investigation bringing to light the undisputed facts of the case. The State party submits that in spite of the precarious security situation it has done its utmost to guarantee fully all basic human rights, including the freedom to express one's thoughts and opinions. The State party notes, however, that the overriding necessity of preserving the fabric of its democratic system requires protective measures.

8.2 The Korean Constitution contains a provision (article 37, paragraph 2) stipulating that "the freedoms and rights of citizens may be restricted by law only when necessary for national security, the maintenance of law and order and for public welfare." Pursuant to the Constitution, the National Security Law contains some provisions which may partially restrict individuals' freedoms or rights. According to the State party, a national consensus exists that the NSL is indispensable to defend the country against the North Korean communists. In this connection, the State party refers to incidents of a violent nature. According to the State party, it is beyond doubt that the author's activities as a member of YKU, an enemy benefitting organization that endorses the policies of the North Korean communists, constituted a threat to the preservation of the democratic system in the Republic of Korea.

8.3 In respect to the author's argument that the Court should have applied the provisions of the Covenant to his case, the State party submits that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation."

9.1 In his comments on the State party's submission, counsel argues that the fact that the State party is in a precarious security situation has no relation with the author's peaceful exercise of his right to freedom of thought, opinion, expression and assembly. Counsel argues that the State party has failed to establish any relation between the North Korean communists and the YKU or the author, and has not provided any sound explanation about which policies of the North Korean communists the YKU or the author endorsed. According to counsel, the State party has likewise failed to show what kind of threat the YKU or the author's activities posed to the security of the country.

9.2 It is submitted that the author joined the YKU as a student with aspiration for democracy and peaceful unification of his country. In his activities, he never had any intention to give benefit to North Korea or put the security of his country in danger. According to counsel, the kind of opinion expressed by the author can be rebutted by discussion and debate, but, as far as such expression is discharged in a peaceful manner, it should never be suppressed by criminal prosecution. In this context, counsel submits that it is not for the State to assume the role of divine judge about what is the truth or the false and the good or the evil.

9.3 Counsel maintains that the author was punished for his political opinion, thought and peaceful expression thereof. He also claims that his right to equal protection before the law under article 26 of the Covenant was denied. In this connection, he explains that this is so because, while every citizen is guaranteed to enjoy the right to freedom of association under article 21 of the Constitution, the author was punished and thereby subjected to discrimination for joining the YKU which had allegedly different political opinions than those of the Government of the Republic of Korea.

9.4 The author refers to the report on the mission to the Republic of Korea by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.[31] The author requests the Committee to recommend to the Government to publish its Views on the communication and its translation into Korean in the Official Gazette.

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[31] E/CN.4/1996/39/Add.1.

Issues and proceedings before the Committee

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee takes note of the fact that the author has not invoked article 22 of the Covenant, related to freedom of association. As a reason for not invoking the provision, counsel has referred to a reservation or declaration by the Republic of Korea according to which article 22 shall be so applied as to be in conformity with Korean laws including the Constitution. As the author's complaints and arguments can be addressed under other provisions of the Covenant, the Committee need not on its own initiative take a position to the possible effect of the reservation or declaration. Consequently, the issue before the Committee is whether the author's conviction under the National Security Law violated his rights under articles 18, 19 and 26 of the Covenant.

10.3 The Committee observes that article 19 guarantees freedom of opinion and expression and allows restrictions only as provided by law and necessary (a) for respect of the rights and reputation of others; and (b) for the protection of national security or public order (*ordre public*), or of public health or morals. The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification. While the State party has stated that the restrictions were justified in order to protect national security and that they were provided for by law, under article 7 of the National Security Law, the Committee must still determine whether the measures taken against the author were necessary for the purpose stated. The Committee notes that the State party has invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considers that the State party has failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of the author's right to freedom of expression compatible with paragraph 3 of article 19. The Committee has carefully studied the judicial decisions by which the author was convicted and finds that neither those decisions nor the submissions by the State party show that the author's conviction was necessary for the protection of one of the legitimate purposes set forth by article 19 (3). The author's conviction for acts of expression must therefore be regarded as a violation of the author's right under article 19 of the Covenant.

10.4 In this context, the Committee takes issue with the State party's statement that the "author was convicted not because the Court intentionally precluded the application of the Covenant but because it was a matter of necessity to give the NSL's provisions priority over certain rights of individuals as embodied in the Covenant in view of Korea's security situation." The Committee observes that the State party by becoming a party to the Covenant, has undertaken pursuant to article 2, to respect and to ensure all rights recognized therein. It has also undertaken to adopt such legislative or other measures as may be necessary to give effect to these rights. The Committee finds it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant. In this context, the Committee notes that the State party has not made the declaration under article 4(3) of the Covenant that a public emergency existed and that it derogated certain Covenant rights on this basis.

10.5 In the light of the above findings, the Committee need not address the question of whether the author's conviction was in violation of articles 18 and 26 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, finds that the facts before it disclose a violation of article 19 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Tae-Hoon Park with an effective remedy, including appropriate compensation for having been convicted for exercising his right to freedom of expression. The State party is under an obligation to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is requested to translate and publish the Committee's Views and in particular to inform the judiciary of the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

L. Communication No. 633/1995, Gauthier v. Canada (Views adopted on 7 April 1999, sixty-fifth session)*

Submitted by:	Robert W. Gauthier
Alleged victim:	The author
State party:	Canada
Date of communication:	5 December 1994
Date of decision on admissibility:	10 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1999,

Having concluded its consideration of communication No.633/1995 submitted to the Human Rights Committee by Mr. Robert W. Gauthier under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Robert G. Gauthier, a Canadian citizen. He claims to be a victim of a violation by Canada of article 19 of the Covenant.

The facts as presented by the author

2.1 The author is publisher of the National Capital News, a newspaper founded in 1982. The author applied for membership in the Parliamentary Press Gallery, a private association that administers the accreditation for access to the precincts of Parliament. He was provided with a temporary pass that gave only limited privileges. Repeated requests for equal access on the same terms as other reporters and publishers were denied.

2.2 The author points out that a temporary pass does not provide the same access as a permanent membership, since it denies *inter alia* listing on the membership roster of the Press Gallery, as well as access to a mailbox for the receipt of press communiques.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case. The text of four individual opinions by seven Committee members is appended to the present document.

2.3 As regards the exhaustion of domestic remedies, the author explains that he has filed numerous requests, not only with the Press Gallery, but also with the Speaker of the House, all to no avail. According to the author, no reasons have been given for denying him full access. The author applied to the Federal Court for a review of the decision of the Press Gallery, but the Court decided that it did not have jurisdiction over decisions of the Press Gallery since it is not a department of the Government of Canada. A complaint filed with the Bureau of Competition Policy, arguing that the exclusion of the National Capital News from equal access constituted unfair competition was dismissed.

2.4 The author then initiated an action in the Provincial Court against the Speaker of the House of Commons, requesting a declaration by the court that the denial of access to the precincts of Parliament on the same terms as members of the Canadian Parliamentary Press Gallery infringed the author's right to freedom of the press as provided in the Canadian Charter of Rights and Freedoms. The Court ruled, on 30 November 1994, that the decision of the Speaker not to permit the author to have access to the facilities in the House of Commons that are used by members of the Press Gallery was made in the exercise of a parliamentary privilege and therefore not subject to the charter or to review by the Court.

2.5 The author points out that he has been trying to obtain equal access to press facilities in Parliament since 1982, and he argues therefore that the application of domestic remedies is unreasonably prolonged, within the meaning of article 5, paragraph 2(b), of the Optional Protocol. He also expresses doubts about the effectiveness of the appeal.

The complaint

3. The author claims that the denial of equal access to press facilities in Parliament constitutes a violation of his rights under article 19 of the Covenant.

State party's observations

4.1 By submission of 28 November 1995, the State party argues that the communication is inadmissible.

4.2 The State party recalls that the author runs an Ottawa based publication, the National Capital News, which is issued with varying degrees of regularity.

4.3 The Canadian Parliamentary Press Gallery is a private, independent, voluntary association formed for the purpose of bringing together media professionals whose principal occupation is the reporting, interpreting and editing of news about Parliament and the federal Government.

4.4 The Speaker of the House of Commons is the guardian of the rights and privileges of the House and its members, and as such, by virtue of parliamentary privilege, has exclusive control over those parts of the Parliamentary precincts occupied by the House of Commons. One of his responsibilities in this regard is controlling access to these areas.

4.5 The State party explains that all Canadian citizens enjoy access to Parliament, which is obtained by means of a pass, of which there are different types. The press pass provides access to the media facilities of Parliament and is issued automatically to accredited members of the Press Gallery.

4.6 The State party explains that there is no formal, official or legal relationship between the Speaker and the Press Gallery. The Press Gallery has been accommodated by the Speaker by maintaining the media facilities of Parliament, such as working space, telephones, access to the Library and Restaurant and the provision of designated seating in the public galleries. The Speaker has no involvement with the day-to-day operations of these facilities, which are independently run by the Press Gallery.

4.7 The State party points out that most of the Press Gallery's facilities are located off Parliament Hill and thus outside the Parliament's precincts. The State party also notes that live television coverage of all proceedings in the House of Commons is available throughout Canada and many journalists thus seldom actually use the media facilities of Parliament.

4.8 The Press Gallery knows several categories of membership, the most relevant being the active and temporary membership. Active membership allows access to all media facilities of Parliament for as long as the member meets the criteria, that is for as long as he or she works for a regularly published newspaper and requires access to the media facilities as part of his or her primary occupation of reporting Parliamentary or federal Government news. To those who do not meet these criteria the Press Gallery grants temporary membership which is granted for a defined period and provides access to substantially all of the media facilities of Parliament, except for access to the Parliamentary Restaurant.

4.9 According to the State party, the author has applied several times for membership in the Press Gallery since founding the National Capital News in 1982. His requests for active membership have not been granted, because the Gallery has been unable to ascertain whether he satisfies the criteria. Temporary membership was given to him instead, which was renewed on several occasions. In this context, the State party points out that the author has been uncooperative in providing the Press Gallery information about the regularity of his newspaper. Without such information necessary to see whether the author fulfils the criteria for active membership, the Gallery cannot admit him as a full member.

4.10 The author has requested that the Speaker of the House of Commons intervene on his behalf. The position of the Speaker's office being one of strict non-interference with Press Gallery matters, the Speaker declined to intervene. The State party emphasizes that at all times the author has enjoyed access to the precincts of Parliament, and access to the media facilities of Parliament during the periods of time when he had a temporary membership card of the Press Gallery.

4.11 The State party submits that the author has instituted several proceedings against the refusal of the Press Gallery to grant him active membership. In 1989, he filed a complaint with the Bureau of Competition Policy, which concluded that the Competition Act had not been contravened. In October 1991, the author's application for judicial review of this decision was denied by the Federal Court since the decision was not reviewable. In 1990, the Federal Court dismissed an application by the author for judicial review of the Press Gallery's decision not to grant him active membership, since the Court lacked jurisdiction.

4.12 An action against the Press Gallery in the Ontario Court (General Division) is still pending. In this action, the author seeks damages of $5 million.

4.13 On 30 November 1994, the Ontario Court (General Division) struck out the action brought by the author against the Speaker of the House of Commons, in which he sought a declaration that "the denial of access to the precincts of Parliament on the same terms as members of the Canadian Parliamentary Press Gallery" infringed his right to freedom of the press as guaranteed in the Canadian Charter of Rights and Freedoms. The Court based itself on jurisprudence that the exercise of inherent privileges of a Canadian legislative body is not subject to Charter review. The author has filed a Notice of Appeal against this decision with the Ontario Court of Appeal, but has not as yet filed the required documentation in proper form.

4.14 The State party argues that the communication is inadmissible for non-exhaustion of domestic remedies. The State party notes that the focus of the author's communication, against the Speaker of the House of Commons, is misdirected since the Speaker's policy has been to administer access to the media facilities of Parliament based on the Press Gallery's determinations regarding membership. Determination of membership is entirely within the jurisdiction of the Press Gallery and lies outside the competence of the Speaker. According to the State party, the suggestion that the Speaker should override the Press Gallery's internal affairs would undermine freedom of the press. Since the source of the author's complaint is the Press Gallery's refusal to grant him active membership, the State party is of the opinion that the author has failed to exhaust the remedies available to him in this regard.

4.15 The State party submits that the author's failure to cooperate with the Press Gallery constitutes a clear failure to exhaust remedies available to him domestically. The State party further notes that legal proceedings against the Press Gallery are still ongoing in the Ontario Court (General Division) and that the author's appeal against the order of the Ontario Court (General Division) striking out his action against the Speaker of the House of Commons remains unresolved, pending his satisfaction of procedural requirements.

4.16 Moreover, the State party argues that the communication is inadmissible for failure to substantiate the allegation that the failure to grant the author full membership of the Press Gallery amounts to a denial of his rights under article 19 of the Covenant. In this context, the State party recalls that the author has never been denied access to the Parliamentary precincts, and that he has had access to the media facilities of Parliament whenever he was in possession of a temporary press pass. The author has not shown any instance in which he has been frustrated in his ability to gain access to or disseminate information about Parliament.

The author's comments on the State party's submission

5.1 In a submission, dated 17 January 1996, the author informs the Committee that he has been prohibited access to the media facilities in Parliament (since he has no press pass). The author explains that while the visitors gallery is open to him, it is of little value to a professional journalist as one is not allowed to take notes when seated in the visitors gallery.

5.2 The author further states that the Press Gallery has obtained a Court order, dated 8 January 1996, that prohibits him from entering its premises. The author acknowledges that these premises are located off Parliament Hill, but states that the Government press releases and other material provided in the Press Gallery's premises are funded by the taxpayers of Canada and form part of the facilities and services provided by the Government for the media.

6.1 In his comments on the State party's submission, dated 5 February 1996, the author contends that the State party's reply consists of false or incomplete information and numerous misleading statements.

6.2 He submits that although no powers or authority have been legally transferred from Parliament or the Government of Canada to the Canadian parliamentary Press Gallery, the Gallery assumes powers to permit or deny access to the facilities and services provided by the Parliament and Government of Canada to the media. The author states that his numerous requests for access were presented to the Press Gallery without success, and that he made repeated applications to the Administrative Officials within the Parliament for access to the media facilities, also without success. His attempts to have the matter remedied by the Courts have also been unsuccessful.

6.3 The author submits that he has been trying to have a solution to his denial of access to the media facilities since 1982, when he founded his newspaper, and argues that the application of domestic remedies should be considered as unreasonably prolonged. In this context, the author points to "the history of deliberate and contrived delays, failure to reply to or even acknowledge reasonable requests for information and assistance, and the evidence that these delays will continue".

6.4 In addition, the author states that the possibility of achieving an effective remedy in Canada within the foreseeable future does not exist. In this context, he notes that the measures to prevent him from exercising his profession have only increased in the recent past, as is shown by the notice denying him access to the Press Gallery premises, the conviction against him for trespassing on the premises of the Press Gallery, the conviction against him for trespassing on Parliament Hill, and the Court order prohibiting him access to the premises of the Press Gallery, that is to the "publicly subsidized facilities and services provided by the Government of Canada for the media".

6.5 The author also states that "the Canadian Parliamentary Press Gallery, while maintaining that it is bending over backwards to allow access to the facilities and services provided for the media by the Government of Canada continues to enforce the Court-ordered injunction prohibiting access for the Publisher of the National Capital News to any of these public facilities and services - now in addition to being denied access to information the author is also under the threat of contempt of Court should he attempt to even seek equal access as his competitors enjoy to information specifically and purposely provided for the media, domestic and foreign, by the Government and Parliament of Canada".

6.6 The author complains about the ridicule and trivializing to which he has been subjected. He refers to a Federal Court Justice who compared the author with "Don Quixote, tilting at windmills", a Provincial Court Justice who commented to him: "You seem to take offence at every slight", as well as the State party's reply to the Human Rights Committee, which according to him trivializes the matter brought before the Committee. In his opinion, this shows that he will never be able to obtain an effective remedy in Canada.

6.7 The author contests the State party's statement that live television coverage of all the activities in the House of Commons is available.

6.8 The author takes issue with the State party's suggestion that his conflict is with a private organization. He states that his complaint is that he has been denied access to the facilities and services provided for the media by the Parliament and Government of Canada, by Canadian officials and Courts. He adds that "the pretext that such access requires membership in conjunction with a group of self-anointed journalists calling themselves the Canadian Parliamentary Press Gallery is not material to this issue for the purposes of article 19(2) of the Covenant". He points out that the Press Gallery has been incorporated in 1987 in order to limit the personal liability of its members, and that in practice it controls access to the media facilities provided by Canada. However, in the author's opinion he is under no obligation to meet prior conditions established by the Press Gallery that limit his freedom of expression. The author also submits that the media facilities in Parliament are staffed by government employees and that the office equipment is owned by the government.

6.9 The author states that he publishes The National Capital News "with a regularity more than appropriate to satisfy the definition of what constitutes newspapers".[32] He claims that no proper application procedure for membership of the Gallery exists and that access is granted or withheld at whim. According to the author, the Press Gallery at no time seriously considered his application and did not review the information he provided. In this context, he claims that a list of the dates of publication of his newspapers was withheld from the members of the Press Gallery. He contests the State party's assertion that he failed to cooperate with the Press Gallery. He further claims that the Speaker of the House of Commons can intervene in situations involving journalists and has done so in the past.

6.10 Further, the author states that he was given daily passes in 1982-83, which were later converted to weekly and then monthly passes. Only in 1990 was he granted a six month temporary membership. He states that he returned the temporary membership since it did not grant him equal access. The author states that temporary membership denied him the right to vote, to ask questions at press conferences, to have a mail slot for receiving all the information available to active members and a listing on the membership list. According to the author, as a result "there was no assurance that all the information would be provided to the author and any information that was sent individually by people to whom the membership list was circulated would not include the author".

6.11 The author states that on 4 January 1996, the Ontario Court dismissed his action against the Press Gallery. The author states that he will be appealing the judgment, but that the proceedings are unreasonably prolonged and thus no obstacle to the admissibility of his communication. Moreover, he states that his communication is directed against the State party, and that his action against the Press Gallery can thus not be a remedy to be exhausted for purposes of the Optional Protocol. The author adds that he has discontinued his appeal against the 30 November 1994 judgment of the Ontario Court concerning his claim against the Speaker of the House of Commons, since it is accurate that the Courts have no jurisdiction over Parliament.

6.12 As regards the State party's assertion that he has not made a prima facie case, the author states that the State party has prohibited him access to the premises of the Press Gallery in the Parliament Buildings, and that it has not intervened to allow access for the author to the Press Gallery premises outside the precincts of Parliament. According to the author it is evident that the State party "has no desire or intention to respect its responsibilities and obligations to abide by article 19(2)".

State party's further submission

7.1 By submission of 25 October 1996, the State party provides some clarifications and acknowledges that the author was denied access to the Parliamentary precincts from 25 July 1995 until 4 August 1995, following an incident on 25 July after which he was charged with trespass for attempting to enter the Press Gallery in Parliament. He was convicted for trespassing on 26 April 1996 and on 9 July 1996 his appeal was dismissed.

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[32] From the 26 October 1992 issue of the National Capital News, provided by the author, it appears that the newspaper was "founded in 1982 to become a daily newspaper".

7.2 The State party explains that although the author has access to the Parliamentary buildings, he does not have access to the premises of the Press Gallery located in the buildings of Parliament. However, there is no Court order prohibiting him this access; the Court order only relates to the premises of the Press Gallery located off Parliament Hill.

7.3 The State party provides a copy of the judgment by the Ontario Court (General Division) of 4 January 1996, in which it was decided that there was no genuine issue for trial in the author's action against the Press Gallery. The judge found, on the basis of uncontradicted affidavit evidence, that the privileges (access to the media facilities in Parliament) the author was seeking were administered by the Speaker of the House of Commons, not by the Press Gallery. As regards the issue of denial of membership, the Judge found that the Press Gallery had not failed to accord the author natural justice. The Judge noted that the author had been given temporary membership on a number of occasions and that his failure to obtain active membership was attributable to his refusal to answer questions posed to him by the Board of Directors of the Press Gallery for the purposes of determining whether or not he fulfilled the requirements for active membership.

7.4 The State party reiterates that the author's failure to gain access to the Parliamentary Press Gallery is directly attributable to his failure to cooperate with the Press Gallery in the pursuit of his application for active membership. According to the State party, he has thus failed to exhaust the simplest and most direct domestic remedy available to him. The State party adds that the Speaker of the House of Commons has "good reason to expect individuals to follow the normal channels for obtaining access to the Parliamentary Press Gallery premises located on the Parliamentary precincts. In order to make access to Parliamentary precincts meaningful, the Speaker needs to ensure that access to any location on the precincts is controlled. For this purpose, in the particular case of the Parliamentary Press Gallery premises located in the Parliamentary precincts, the Speaker has chosen, as a matter of practice, to condition such access on membership of the Canadian Press Gallery." The State party submits that the Speaker's practice is reasonable and appropriate and consistent with the freedom of expression and of the press.

Author's further comments

8.1 In his comments on the State party's further submission, the author complains about the delays the State party is causing and submits that his complaint is well-founded and has merit, particularly in the light of the State party's demonstrated practice and intention to prolong a domestic resolution.

8.2 The author reiterates that the Government of Canada prevents him to seek and receive information and observe proceedings on behalf of his readers, and prohibits his access to facilities and services provided for the media. He emphasizes that favoured journalists benefit from special privileges, among others free phones, services of a Government staff of nine, access to Press Conferences, office space, access to press releases and to information about the itineraries of public officials, parking, access to the Library of Parliament.

8.3 The author submits that the Court has ruled that he cannot obtain the privileges he wants from the Press Gallery, since they fall under the control of the Speaker of the House of Commons. At the same time, the Speaker refuses to intervene in what he sees as internal matters of the Press Gallery. The author states that he tried to comply with the Press Gallery's requirements,[33] but that there is no appeal available against their decisions. He contests that the temporary pass does not restrict the freedom of expression, as it denied full access to all facilities and services provided for the press.

8.4 The author acknowledges that the Press Gallery may have some merit in screening applicants who request access to the facilities and services provided for the media, but argues that there should be a recourse available of any decision that is unfair or in violation of fundamental human rights. He states that Canada clearly is unwilling to provide such a recourse, as shown by the refusals of the Speaker of the House to address the matter as well as by its reply to the Committee, and argues that all available and effective domestic remedies have thus been exhausted.

Committee's decision on admissibility

9.1 At its 60th session, the Committee considered the admissibility of the communication.

9.2 The Committee noted that the State party had argued that the communication was inadmissible for failure to exhaust domestic remedies. The Committee carefully examined the remedies listed by the State party and came to the conclusion that no effective remedies were available to the author. In this context, the Committee noted that it appeared from the Court decisions in the case that the access the author was seeking, fell within the competence of the Speaker of the House of Commons, and that decisions of the Speaker in this matter were not reviewable by the Courts. The State party's argument that the author could find a solution by cooperating in the determination of his qualifications for membership in the Canadian Parliamentary Press Gallery did not address the issue raised by the author's communication, whether or not the limitation of access to the press facilities in Parliament to members of the Press Gallery violated his right under article 19 of the Covenant.

9.3 The State party had further argued that the author had failed to present a prima facie case and that the communication was thus inadmissible for non-substantiation of a violation. The Committee noted that it appeared from the information before it that the author had been denied access to the press facilities of Parliament, because he was not a member of the Canadian Parliamentary Press Gallery. The Committee further noted that without such access, the author was not allowed to take notes during debates in Parliament. The Committee found that this might raise an issue under article 19, paragraph 2, of the Covenant, which should be considered on its merits.

9.4 The Committee further considered that the question whether the State party can require membership in a private organization as a condition for the enjoyment of the freedom to seek and receive information, should be examined on its merits, as it might raise issues not only under article 19, but also under articles 22 and 26 of the Covenant.

10. Accordingly, on 10 July 1997, the Human Rights Committee decided that the communication was admissible.

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[33] He states that in one year he published an average of three issues a month.

State party's submission on the merits

11.1 By submission of 14 July 1998, the State party provides a response on the merits of the communication. It reiterates its earlier observations and explains that the Speaker of the House of Commons, by virtue of Parliamentary privilege, has control of the accommodation and services in those parts of the Parliamentary precincts that are occupied by or on behalf of the House of Commons. One of the Speaker's duties in this regard is controlling access to these areas. The State party emphasizes that the absolute authority of Parliament over its own proceedings is a crucial and fundamental principle of Canada's general constitutional framework.

11.2 With regard to the relationship between the Speaker and the Press Gallery, the State party explains that this relationship is not formal, official or legal. While the Speaker has ultimate authority over the physical access to the media facilities in Parliament, he is not involved in the general operations of these facilities which are administered and run entirely by the Press Gallery.

11.3 Press passes granting access to the media facilities of Parliament are issued to Gallery members only. The State party reiterates that the determination of membership in the Press Gallery is an internal matter and that the Speaker has always taken a position of strict non-interference. It submits that as a member of the public, the author has access to the Parliament buildings open to the public and that he can attend the public hearings of the House of Commons.

11.4 In this connection, the State party reiterates that the proceedings of the House of Commons are broadcasted on television and that any journalist can report effectively on the proceedings in the House of Commons without using the media facilities of Parliament. The State party adds that the transcripts of the House debates can be found on Internet the following day. Speeches and press releases of the Prime Minister are deposited in a lobby open to the public, and are also posted on Internet. Government reports and press releases are likewise posted on Internet.

11.5 The State party argues that the author has not been deprived of his freedom to receive and impart information. Although as a member of the public, he may not take notes while sitting in the Public Gallery of the House of Commons, he may observe the proceedings in the House and report on them. The State party explains that "Note-taking has traditionally been prohibited in the public galleries of the House of Commons as a matter of order and decorum and for security reasons (e.g. the throwing of objects at the members of Parliament from the gallery above)". Moreover, the information he seeks is available through live broadcasting and Internet.

11.6 Alternatively, the State party argues that any restriction on the author's ability to receive and impart information that may result from the prohibition on note-taking in the public gallery in the House of Commons is minimal and is justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members. According to the State party, states should be accorded a broad flexibility in determining issues of effective governance and security since they are in the best position to assess the risks and needs.

11.7 The State party also denies that a violation of article 26 has occurred in the author's case. The State party acknowledges that a difference in treatment exists between journalists who are members of the Press Gallery and those who do not satisfy the criteria for membership, but submits that this has not lead to any significant disadvantage for the author. The State party also refers to the Committee's jurisprudence that not every differentiation can be deemed to be discriminatory and submits that the distinction made is compatible with the provisions of the Covenant and based on objective criteria. In this context, the State party emphasizes that access to press facilities in Parliament must necessarily be limited since the facilities can only accommodate a limited number of people. It is reasonable to limit such access to journalists who report regularly on the proceedings in Parliament. The Speaker is aware of the criteria for membership in the Press Gallery and relies on these criteria as an appropriate standard for determining who should or should not have access to the media facilities of Parliament. It is submitted that these criteria, which the Speaker has by implication adopted and endorsed, are specific, fair and reasonable, and cannot be deemed arbitrary or unreasonable.

11.8 With regard to article 22 of the Covenant, the State party observes that the author is not being forced by the Government to join any association. He is free not to associate with the Press Gallery, nor is his ability to practice the profession of journalism conditioned in any way upon his membership of the Press Gallery.

The author's comments on the State party's submission

12.1 In his comments, dated 25 September 1998, the author refers to his earlier submissions. He emphasizes that he is without remedy because of the refusal of the Speaker to intervene on his behalf and to grant him access to the press facilities or even hear him. The author emphasizes that no powers have been transferred from the Speaker to the Press Gallery, nor has the Speaker the authority to delegate his responsibilities to an individual group without accountability to the Members of Parliament. According to the author, the Parliamentary privileges are of no force or effect when they infringe fundamental rights such as those contained in the Covenant. The author argues that the State party is allowing a private organization to restrict access to news and information.

12.2 The author also gives examples of how Speakers have intervened in the past and given access to the media facilities in Parliament to individual journalists who had been denied membership by the Press Gallery. He rejects the State party's argument that the Speaker would be interfering with the freedom of the press if he were to intervene, on the contrary, he argues that the Speaker has a duty to intervene in order to protect the freedom of expression.

12.3 The author reiterates that as a journalist he requires equal access to the media facilities of Parliament.[34] He states that, although it can be seen as reasonable for the Speaker to have the accreditation of journalists handled by the staff assigned to the Press Gallery, things got out of control and the Press Gallery began using favouritism on the one hand and coercion and blackmail on the other, and as a result the author was denied access and has no recourse. He emphasizes that he meets all the requirements for accreditation. In any event, he argues that the Gallery's by-laws can never affect his fundamental rights under article 19, paragraph 2, to have access to information. He adds that the Gallery's by-laws are arbitrary, inconsistent, tyrannical and in violation not only of the Covenant but also of the State party's own constitution. The author submits that if a group of journalists wishes to form their own association, they should feel free to do so. This private, voluntary organization should in no way be given authority or supervision over any publicly-financed activities and services as it has today, especially since no possibility of appeal from its decisions is provided. He rejects membership in this association as a prerequisite to enjoying his fundamental right to freedom of expression and submits that he should not be forced to belong to the Press Gallery in order to receive information that is made available by the House of Commons.

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[34] The author refers to the 1992 Annual Meeting of the Press Gallery, during which members stated that they had a fundamental right to be at the Parliament facilities in order to have access to information.

12.4 With regard to the State party's argument that live coverage of all proceedings in the House of Commons is available, the author submits that the Cable Public Affairs Channel which broadcasts the House of Commons proceedings, is a news service in competition with the author. He states that it is of very little use as a journalist, since one has to watch whatever they decide to broadcast. The author moreover contests that live coverage of all proceedings in the House of Commons is available, since very often debates are broadcasted as replays, and most Committee meetings are not televized. The author also argues that there is much more to reporting on the activities of Parliament than observe the sessions that take place in the House of Commons. In addition, being recognized in the eyes of the Government community as part of the accepted media is essential to the process of networking within that community. The author therefore maintains that the restrictions by not having access to the media facilities in Parliament seriously impede if not render impossible his ability to seek and obtain information about the activities of the Parliament and Government of Canada.

12.5 The author rejects the State party's argument that his being allowed to do his work along with the other 300 accredited journalists would encroach on the effective and dignified operation of Parliament and the safety and security of its members. With regard to article 26 of the Covenant, the author denies that the difference in treatment between him and journalists members of the Press Gallery is reasonable and reiterates that he has been arbitrarily denied equal access to media facilities. Although he accepts that the State party may limit access to press facilities in Parliament, he submits that such limits must not be unduly restraining, must be administered fairly, must not infringe on any person's right to freedom of expression and the right to seek and receive information, and must be subject to review. According to the author, the absence of an avenue of appeal of a decision by the Press Gallery constitutes a violation of equal protection of the law. The author does not accept that limited space means that he cannot be allowed to use the press facilities, since other new journalists have been admitted and since there would be other possibilities of solving this, such as limiting the number of accredited journalists who work for the same news organization.[35]

12.6 Finally, the author submits that the exclusion from access to essential services and facilities provided by the House of Commons for the press of those journalists who are not a member of the Canadian Press Gallery constitutes a violation of the right to freedom of association, since no one should be forced to join an association in order to enjoy a fundamental right such as freedom to obtain information.

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[35] The author refers to the State-owned CBC, which according to him has 105 members in the Press Gallery.

Committee's examination of the merits

13.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

13.2 With regard to the author's claims under articles 22 and 26 of the Covenant, the Committee has reviewed, under article 93 (4) of its Rules of Procedure, its decision of admissibility taken at its 60th session and considers that the author had not substantiated, for purposes of admissibility, his claim under the said articles. Nor has he further substantiated it, for the same purposes, with his further submissions. In these circumstances, the Committee concludes that the author's communication is inadmissible under article 2 of the Optional Protocol, as far as it relates to articles 22 and 26 of the Covenant. In this regard, the admissibility decision is therefore repealed.

13.3 The issue before the Committee is thus whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: "In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."[36] Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organisation, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organisation. When he does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information. The question is whether or not this restriction is justified under paragraph 3 of article 19. The restriction is, arguably, imposed by law, in that the exclusion of persons from the precinct of Parliament or any part thereof, under the authority of the Speaker, follows from the law of parliamentary privilege.

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[36] General Comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996.

13.6 The State party argues that the restrictions are justified to achieve a balance between the right to freedom of expression and the need to ensure both the effective and dignified operation of Parliament and the safety and security of its members, and that the State party is in the best position to assess the risks and needs involved. As indicated above, the Committee agrees that the protection of Parliamentary procedure can be seen as a legitimate goal of public order and an accreditation system can thus be a justified means of achieving this goal. However, since the accreditation system operates as a restriction of article 19 rights, its operation and application must be shown as necessary and proportionate to the goal in question and not arbitrary. The Committee does not accept that this is a matter exclusively for the State to determine. The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of article 19 (2) of the Covenant.

13.7 In this connection, the Committee notes that there is no possibility of recourse, either to the Courts or to Parliament, to determine the legality of the exclusion or its necessity for the purposes spelled out in article 19 of the Covenant. The Committee recalls that under article 2, paragraph 3 of the Covenant, States parties have undertaken to ensure that any person whose rights are violated shall have an effective remedy, and that any person claiming such a remedy shall have his right thereto determined by competent authorities. Accordingly, whenever a right recognized by the Covenant is affected by the action of a State agent there must be a procedure established by the State allowing the person whose right has been affected to claim before a competent body that there has been a violation of his rights.

14. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

15. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Gauthier with an effective remedy including an independent review of his application to have access to the press facilities in Parliament. The State party is under an obligation to take measures to prevent similar violations in the future.

16. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Lord Colville, Elizabeth Evatt, Cecilia Medina Quiroga and Hipólito Solari Yrigoyen

(partly dissenting)

In regard to paragraph 13.2 of the Committee's Views, our opinion is that the claims of the author under articles 22 and 26 of the Covenant have been sufficiently substantiated and that there is no basis to revise the decision on admissibility.

Article 26 of the Covenant stipulates that all persons are equal before the law. Equality implies that the application of laws and regulations as well as administrative decisions by Government officials should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment. To deny the author, who is a journalist and seeks to report on parliamentary proceedings, access to the Parliamentary press facilities without specifically identifying the reasons, was arbitrary. Furthermore, there was no procedure for review. In the circumstances, we are of the opinion that the principle of equality before the law protected by article 26 of the Covenant was violated in the author's case.

In regard to article 22, the author's claim is that requiring membership in the Press Gallery Association as a condition of access to the Parliamentary press facilities violated his rights under article 22. The right to freedom of association implies that in general no one may be forced by the State to join an association. When membership of an association is a requirement to engage in a particular profession or calling, or when sanctions exist on the failure to be a member of an association, the State party should be called on to show that compulsory membership is necessary in a democratic society in pursuit of an interest authorised by the Covenant. In this matter, the Committee's deliberations in paragraph 13.6 of the Views make it clear that the State party has failed to show that the requirement to be a member of a particular organisation is a necessary restriction under paragraph 2 of article 22 in order to limit access to the press gallery in Parliament for the purposes mentioned. The restrictions imposed on the author are therefore in violation of article 22 of the Covenant.

(Signed) Lord Colville (Signed) Elizabeth Evatt

(Signed) Cecilia Medina Quiroga (Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Prafullachandra N. Bhagwati
(partly dissenting)

In regard to paragraph 13.2 of the Committee's Views, my opinion is that the claims of the author under articles 22 and 26 of the Covenant have been sufficiently substantiated and that there is no basis to revise the decision on admissibility.

Article 26 of the Covenant stipulates that all persons are equal before the law. Equality implies that the application of laws and regulations as well as administrative decisions by Government officials should not be arbitrary but should be based on clear coherent grounds, ensuring equality of treatment. To deny the author, who is a journalist and seeks to report on parliamentary proceedings, access to the Parliamentary press facilities was arbitrary. The only reason why the author was denied access was that was not a member of the Press Gallery Association. What article 26 strikes at is arbitrariness in treatment. Here the basis of differentiation between a journalist like the author who was denied access, and the journalists who were given access was membership of a private organization, viz the Press Gallery Association which basis did not bear any rational relation or relevance to the object of accreditation. The requirement of membership of the Press Gallery Association was therefore clearly arbitrary. Furthermore, there was no procedure for review. In the circumstances, I am of the opinion that the principle of equality before the law protected by article 26 of the Covenant was violated in the author's case.

In regard to article 22, the author's claim is that requiring membership in the Press Gallery Association as a condition of access to the Parliamentary press facilities violated his rights under article 22 read with article 19. The right to freedom of association implies that in general no one may be forced by the State to join an association. When membership of an association is a requirement to engage in a particular profession or calling, or when sanctions exist on the failure to be a member of an association, the State party should be called on to show that compulsory membership is necessary in a democratic society in pursuit of an interest authorised by the Covenant. In this matter, the Committee's deliberations in paragraph 13.6 of the Views make it clear that the State party has failed to show that the requirement to be a member of a particular organization was a necessary restriction under paragraph 2 of article 22 in order to limit access to the press gallery in Parliament for the purposes mentioned. The restrictions imposed on the author are therefore in violation of article 22 of the Covenant.

(Signed) Prafullachandra N. Bhagwati

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by David Kretzmer
(partly dissenting)

I join the opinion of my colleagues Mr. Solari Yrigoyen and Ms. Elizabeth Evatt, in the view that there was a violation of article 22 in the present case. However, I do not share their view that a violation of article 26 has also been substantiated. In my mind, it is not sufficient, in order to substantiate a violation of article 26, merely to state that no reasons were given for a decision. Furthermore, it seems to me that the author's claim under article 26 is in essence a restatement of his claim under article 19. It amounts to the argument that while others were allowed access to the Press Gallery, the author was denied access. Accepting that this constitutes a violation of article 26 would seem to imply that in almost every case in which one individual's rights under other articles of the Covenant are violated, there will also be a violation of article 26. I therefore join the Committee in the view that the author's claim of a violation of article 26 has not been substantiated. The Committee's decision on admissibility should be revised and the claim under article 26 be held inadmissible.

(Signed) David Kretzmer

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Rajsoomer Lallah
(partly dissenting)

The Committee is of the view that the claims of the author in relation to articles 22 and 26 of the Covenant have not been sufficiently substantiated for purposes of admissibility and has revised its previous favourable decision on admissibility.

It seems to me that articles 22 and 26 are, in the particular circumstances of this communication, particularly relevant in deciding whether there has been a violation of the author's right under article 19 (2) of the Covenant to seek, receive and impart information, in relation to Parliamentary proceedings which are matters of interest to the general public. It is to be noted that access to parliamentary press facilities in this regard is given exclusively to members of an association which has so to say a monopoly over access to those facilities.

Freedom of association under article 22 inherently includes freedom not to associate. To impose membership of an association on the author as a condition precedent to access to Parliamentary press facilities in effect means that the author is compelled to seek membership of the association, which may or may not accept the author as a member, unless he decides to forego the full enjoyment of his rights under article 19 (2) of the Covenant.

The rights of the author, in respect of equality of treatment guaranteed under article 26, have been violated in the sense that the State party has, in effect, delegated its control over the provision of equal press facilities within public premises to a private association which may, for reasons of its own and not open to judicial control, admit or not admit a journalist like the author as a member. The delegation of this control by the State party exclusively to a private association generates inequality of treatment as between members of the association and other journalists who are not members.

I conclude, therefore, that the author has been a victim of a violation of his rights under article 19 (2) by the State party's recourse to measures, designed to provide access to journalists reporting on Parliamentary proceedings, which are themselves violative of articles 22 and 26 of the Covenant and which cannot be justified by the restrictions permissible under article 19 (3) of the Covenant.

(Signed) Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 644/1995, Ajaz and Jamil v. Republic of Korea (Views adopted on 13 July 1999, sixty-sixth session)*

Submitted by:	Mohammed Ajaz and Amir Jamil
Alleged victim:	The authors
State party:	Republic of Korea
Date of communication:	1 June 1995
Date of decision on admissibility:	19 March 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 13 July 1999,

Having concluded its consideration of communication No.644/1995 submitted to the Human Rights Committee by Mohammed Ajaz and Amir Jamil, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mohammad Ajaz and Amir Jamil, both Pakistani citizens at the time of submission of the communication incarcerated in the Republic of Korea. The authors claim that they are victims of violations of their human rights by the Republic of Korea.

The facts as presented by the authors

2.1 The authors state that they were convicted of murdering one Mokhter Ahmed (Vicky) and one Ahsan Zuber (Nana), two fellow Pakistani citizens, in Songnam City on 24 March 1992. The authors were tried and sentenced to death on 29 September 1992, after having pleaded not guilty to the charges.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 The authors state that on 23 March 1992 they were in Songnam's mountain area south-east of Seoul, together with the deceased and three other men. According to the authors one of them, a certain Zubi accused the deceased of murdering his brother, who had been stabbed to death earlier that night in the town of Itaewon. The authors allege that Zubi then stabbed both deceased. The authors claim that they begged Zubi to desist, but that Zubi threatened that if the authors spoke of the evening's incidents, he would "include all of them in the murders".

2.3 The authors state that, on 26 March 1992, they were questioned by the Republic of Korea police as to the whereabouts of Zubi. The authors claim that they told the police that they knew nothing about Zubi's whereabouts. The authors further claim that the police and the investigating prosecutor then brought in one Zahid, the authors' roommate, and that Zahid was forced to sign a statement written by the police which alleged that the authors had stolen approximately $200 from Zahid on 5 March 1992. The authors submit that the police elicited the statement from Zahid by severely beating him. The authors were subsequently charged with theft.

2.4 The authors state that, on 28 March 1992, the police discovered the bodies of the deceased. They further claim that, some time in April 1992, the police found and questioned Zubi. The authors submit that Zubi had been beaten by the police into signing a statement in which he confessed to the murders, and in which he implicated the authors. The authors state that "all six Pakistani men" who were present at the scene of the crime implicated Zubi. The authors claim that the police, in order to obtain inculpatory statements from the authors, proceeded to beat them and to apply electro-shock to their genitals. They state, however, that they neither made nor signed any confessions.

The complaint

3.1 The authors state that, during the trial, both Zubi and Zahid testified that the police forced them to sign statements which implicated the authors. The authors also claim that no evidence was brought against them at trial. They state that the murder weapons were never found, that evidence of a "racketeering and criminal ring" in which they were allegedly involved was never substantiated and that after a witness testified to being present while the authors were being beaten by the police, the court was cleared of all defendants, following which, upon their return, the witness retracted his statement on record. They also complain about errors in the translation of their statements.

3.2 The authors state that they were sentenced to death, while Zubi received a sentence of 15 years of imprisonment, and others present at the scene of the crime received a sentence of five years. They submit that the Supreme Court and the High Court allowed the sentences to stand. The authors acknowledge that they did not fully cooperate with the authorities, and submit that they were frightened of their co-accused Zubi, who threatened to harm their families if they told the truth.

3.3 Although the authors do not claim specific violations under the Covenant, the communication appears to raise issues under articles 6, 7, 9, 10 and 14.

State party's comments on admissibility and authors' comments thereon

4.1 By submission of 2 October 1995, the State party states that, on 29 September 1992, the Seoul Criminal District Court convicted the authors for murder, abandonment of corpse, robbery and attempted robbery and sentenced them to death. On 28 January 1993, the Seoul High Court denied the authors' appeal, and on 4 May 1993, the Supreme Court dismissed a further appeal. With this, the State party acknowledges that all available domestic remedies have been exhausted.

4.2 The State party submits that the authors have been convicted of the murders on the basis of testimonies and confessions of three accomplices to the crime. The authors themselves did not make a confession, and the State party argues that their allegations of torture are thus incredible. The State party contests the authors' claim that Imran Shazad (Zubi) confessed to the murders, and states that he only confessed to being an accomplice.

4.3 The State party submits that the authors have been sentenced to death because of the seriousness of their crime, and that their co-accused have been sentenced less severely because their crime was less serious. The State party adds that, in the absence of additional evidence, it cannot reinvestigate the case. However, if the authors can present sufficient evidence that a miscarriage of justice has occurred, they are entitled to a retrial.

5.1 In their response to the State party's submission, the authors reiterate that all witnesses and accused were tortured by the police and gave their testimony under pressure.

5.2 The authors further contend that the police beat them in their faces, and with a baseball bat over their bodies, in order to make them confess. During the interrogation, the interpreter Yooa Suk Suh was present and witnessed the beatings. Later they were subjected to electric shocks. They reiterate that during the trial their co-accused denied that the authors were the murderers. They further note that the State party mentions the names of the persons on whose evidence they were allegedly convicted, but claim that those mentioned were only interpreters who all testified that they were beaten. They request that the State party furnish copies of the trial transcript.

5.3 The authors further state that the Republic of Korea authorities do not allow free correspondence with outside organizations such as the Human Rights Committee.

6.1 By a submission of 29 April 1996, the State party reiterates that, although the authors denied their involvement in the crime from the beginning and throughout the trial, the testimonies of Yooun Suk Suh, Moahammed Tirke and Sang Jin Park, accomplices to the crimes, demonstrate that the authors murdered their victims in revenge against a rival criminal organization. The State party reiterates that their convictions were based on concrete evidence. The State party further explains that the authors were represented by legal counsel throughout the trial and the appeals.

6.2 As regards the right to correspondence, the State party submits that the Prisoners Communications Rules are in accordance with the United Nations Standard Minimum Rules for the Treatment of Prisoners, and allow correspondence with family and friends. Further, article 18 of the Penal Administration Act permits occasional correspondence with those other than family and friends. The latter right can be restricted only in exceptional cases for the sake of correctional education.

7. In their response to the State party's submission, the authors reiterate that the persons mentioned by the State party as having testified against them were interpreters during their time in detention. They conclude that this shows that the accusations against them were fabricated, and request the Committee to demand

from the State party copies of the statements used in the trial. In this context, the authors claim that the Head of the Prosecutor's Office was found guilty of corruption six months after their trial.

Committee's decision on admissibility

8.1 At its 59th session, the Human Rights Committee considered the admissibility of the communication.

8.2 The Committee ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement.

8.3 The Committee noted that the State party had acknowledged that the authors had exhausted all available domestic remedies, and that it had not raised any other objection to the admissibility of the communication.

8.4 The Committee considered that the allegations raised in the communication, including those of torture, confessions and testimonies given under duress, the use of these testimonies against the authors and the reliance of the Republic of Korea judicial authorities on these testimonies despite later withdrawal of the accusations contained therein, need to be examined on their merits.

9. Accordingly, on 19 March 1997, the Human Rights Committee decided that the communication was admissible and requested the State party to furnish original copies and translations into English of the trial transcripts and judgements in the case against the authors, as well as the statements on the basis of which the authors were convicted.

State party's observations and the authors' comments

10.1 By submission of 7 November 1997, the State party recalls the facts of the case against the authors as established by the courts. With regard to the authors' claims that they were forced to provide false testimony under mistreatment, the State party submits that the investigations documents show that the authors' testimonies were recorded word for word and that they had full opportunity to present an alibi. The State party emphasizes that a defence counsel was provided at all three stages of the proceedings. In relation to the translation, claimed to be inaccurate by the authors, the State party notes that this point was argued at length by the authors' counsel. A reinvestigation conducted in April 1997 proved the authors' claims to be inaccurate.

10.2 In a spirit of cooperation with the Committee, the State party submits that it reviewed the authors' case, despite it having been fairly and thoroughly deliberated by the courts. During the reinvestigation, conducted by a public prosecutor from the Ministry of Justice, the authors and the accomplices verified that their testimonies had been correctly recorded in the initial investigation documents. According to the State party, this nullifies the claim that acts of torture were employed to obtain confessions from the authors. When the authors reviewed the content of the translations, they acknowledged that the translations were done properly.

10.3 In respect to the authors' claim of having been tortured, the State party notes that this allegation was brought before the court during the trial, but that the authors and their legal defence failed to present any tangible evidence, and their claims were dismissed. In this connection, the State party recalls that acts of torture are prohibited by law; if torture nevertheless occurs, the perpetrator is severely punished and any confession obtained through acts of torture loses its validity.

10.4 The State party further submits that the authors tried to entice and threaten the accomplices to offer favourable testimonies and manufacture evidence. According to the State party this is shown by correspondence and anonymous blackmail messages. It encloses English translations of some letters.

10.5 With regard to the Committee's request for the trial transcripts and the judgements in the case, the State party maintains as a rule that it is not allowed to peruse, photocopy and transmit the records of closed cases in order to protect the safety of victims and witnesses and the repute of defendants. It moreover argues that translating about a thousand pages of investigation documents is physically impossible at this time.

11.1 By letter of 30 June 1997, Mr. Hyoung Tae Kim, Chairman of the Korean Catholic Human Rights Committee presents himself as the authors' legal representative and encloses a power of attorney to this effect.

11.2 By submission of 23 March 1998, the authors comment on the State party's submission. They reiterate that their conviction is not based on facts but on speculation. They reiterate that they were taken into custody on false charges of robbery, that they were ill treated and that the interpreters misrepresented the facts.

11.3 With regard to the State party's reinvestigation, the authors state that a prosecutor came to visit them in prison in late April 1997, and that he asked them questions which were translated by a prison guard. They state that no proper reinvestigation has been carried out. They deny that they verified that their statement had been properly recorded in the investigation documents and state that they have never been allowed to verify the contents of the translations of their statements.

11.4 The authors reject the State party's claims that they tried to influence the witnesses and co-accused in order to have them testify in their favour.

11.5 The authors state that they cannot show how the police tortured them, but they refer to the statements made by the accused at trial that they had been tortured. Mr. Ajaz states that he suffered permanent damage to his left ear, and Mr. Amir nasal damage and the fracture of his right hand finger. They state that they have no access to their medical reports.

12.1 By further submission of 3 July 1998, the State party provides additional observations. With regard to the authors' claim that they were found guilty because of errors in the translation and interpretation, the State party submits that the testimony of the translators shows that the authors' statements have been correctly translated. In this context, the State party notes that one of the interpreters was a Pakistani national.

12.2 With regard to the authors' allegations of torture, the State party refers to a medical report that at the time of his arrest, Mr. Ajaz was suffering from chronic tympanitis of the left ear. In court, a Korean interpreter testified that he never saw any use of torture during the investigative process. According to the

State party, during the reinvestigation in April/May 1997, the authors never complained to the prosecutor about use of torture against them.

12.3 With regard to the authors' suggestion that they were discriminated against because they were foreigners, the State party notes that all criminal proceedings apply equally to foreigners and citizens alike and that the Constitution assures everyone within the State's jurisdiction effective protection and remedies against any acts of racial discrimination.

12.4 The State party notes that some of the discrepancies between the State party's account of the facts and that of the authors are due to problems of translation. The State party maintains that the authors were found guilty by the courts on the basis of the consistent and coinciding confessions of the accomplices. According to the State party, the authors during the court hearings denied being present at the scene of the crime, and acknowledged for the first time their presence in their interview with the prosecutor on 1 May 1997. The prosecutor also spoke to one of the co-accused in prison, who testified that he had lied in court when he said that he didn't know anything about the crime, and that he had taken part in it together with the authors.

12.5 The State party maintains that the authors received a fair and impartial trial, and that they were found guilty at three levels, by the District Court, the High Court and the Supreme Court. It adds that the authors are entitled to a retrial if they present sufficient evidence.

12.6 The State party provides copies of English translations of the Courts' judgements. From the judgements, it appears that the District Court considered the voluntariness of the statements made by the defendants, but that in the light of the testimonies it found no sustainable reason to doubt the voluntariness of the statements. On appeal, the High Court examined the authors' grounds of appeal that the statements made by the defendants were not trustworthy because of mistakes in the translation and interpretation, and because of threats and violence used against the defendants. The High Court found however that the interpreters were capable of interpreting in Pakistani and Korean, and did so correctly. It also noted that the police officer in charge of the investigation had made detailed and elaborate reports on the investigation process and that no evidence was found to prove that he had treated the accused harshly in any way or that he fabricated testimony. The Court concluded that the defendants had not been forced to testify, nor tortured. The Supreme Court rejected the authors' appeal on the basis that no misinterpretation of facts in the use of evidence occurred which would cause a violation of the law.

13.1 By letter of 23 July 1998, the authors' representative informs the Committee that the authors have been granted a pardon by the President. This information is confirmed by a note from the State party, dated 2 September 1998, that the authors' death sentence has been commuted to life imprisonment, in compliance with its national amnesty programme.

13.2 By letter of 26 February 1999, the authors' representative informs the Committee that the authors have been released from prison and have returned to Pakistan on 25 February 1999. This information has been confirmed by the State party in a note dated 9 March 1999.

Issues and proceedings before the Committee

14.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

14.2 The Committee notes that the authors' claims that there was not enough evidence to convict them, that they had been tortured in order to force them to confess and that mistakes occurred in the translations of their statements were examined by both the court of first instance and the court of appeal, which rejected their claims. The Committee refers to its jurisprudence that it is not for the Committee, but for the courts of States parties, to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The Committee regrets that the State party did not provide a copy of the trial transcript which has prevented the Committee from examining fully the conduct of the trial. Nevertheless, the Committee has considered the judgements of the District Court and the High Court. Having regard to the content of these judgments and in particular their evaluation of the authors' claims subsequently made to the Committee, the Committee does not find that those evaluations were arbitrary or amounted to a denial of justice or that the authors have raised before the Committee any issues beyond those so evaluated.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 647/1995, Pennant v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Wilfred Pennant (represented by Mr. S. Lehrfreund from the London Law firm of Simons Muirhead and Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	8 November 1994 (initial submission)
Date of decision on admissibility:	20 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No. 647/1995 submitted to the Human Rights Committee by Mr. Wilfred Pennant, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Wilfred Pennant, a Jamaican national, serving a life sentence at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7; 9 paragraphs 2, 3 and 4; 10 paragraph 1; and 14, paragraphs 1 and 3 (a), of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the London Law firm of Simons Muirhead and Burton.

The facts as submitted by the author

2.1 The author was convicted of the murder, on 22 February 1983, of one Ernest Stephens, a police officer. He was sentenced to death on 4 October 1984 by the St Catherine District Court, Kingston, Jamaica. His appeal was dismissed by the Court of Appeal of Jamaica on 15 May 1986. On 15 December 1987, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. On 14 December 1989 the author's sentence was commuted to life imprisonment.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 The author states that, on 1 May 1983, he went to Chapletown Police Station to report the incident. He was transferred to Spanish Town Police Station, on an unspecified date, where he was charged for murder on 4 May 1983. He was not brought before a judicial officer until June 1983, approximately one month after his arrest.

2.3 The prosecution's case was based on evidence given by an eyewitness and a deposition made by a second witness who died before the trial took place. During the trial, Vincent Johnson, an assistant bailiff, testified that on 23 February 1983, he had accompanied officer Stephens and the author's landlord, with a warrant of commitment for non-payment of rent. When they came upon the author in the street, the author claimed to have paid through the landlord's lawyer. Mr. Johnson further testified that when officer Stephens requested that the author accompany him to verify with the lawyer that payment had been made, the author refused. The witness testified that Stephens held the author by the waist, whereupon the author took an ice pick from his waist and stabbed the policeman, who fired six shots at the author from a distance of 3 feet but did not hit him. The author then ran away. All these events are said to have taken place outside, on the street.

2.4 A deposition was admitted into evidence during the trial in which the landlord (who had died by the time the trial was held) and witness to the murder corroborated that the events had taken place outside, but claimed that he had only seen one stab, and had not seen where the ice pick had come from. He also said that the deceased did not grab the author by the waist. Counsel claims this is in evident contradiction with the evidence given by the main crown witness.

2.5 The case for the defence was one of self-defence based on the evidence given by the author, who stated that the events had taken place in his room. He claimed that he was listening to the radio when Officer Stephens broke into his room with a gun in his hand. The author testified that he jumped out of bed, grabbed Mr. Stephens by the collar and a fight ensued. Two shots were fired. The author took the ice pick from the table and stabbed Stephens twice. Mr. Stephens ran out of the house followed by the author. Stephens fired several shots against the author who ran off. On 1 May the author gave himself up to the police when he heard that the policeman had died.

2.6 A police officer gave evidence for the prosecution in which he stated that the author's room had been ransacked and the lock on the door forced.

The complaint

3.1 It is submitted that the delay of 1 month between arrest and appearance before a judicial officer and the delay of 3 days between his arrest and his being charged constitute a violation of articles 9, paragraphs 2, 3 and 4; and 14 paragraph 3 (a) of the Covenant. In this respect, counsel refers to the Committee's jurisprudence and General Comments.[37]

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[37] General Comment No. 8 in respect of article 9; communication No. 336/1988 (Andres Fillastre v. Bolivia), Views adopted on 5 November 1991; communication No. 253/1987 (Paul Kelly v. Jamaica), Views adopted on 8 April 1991; communication No. 277/1988 (Terán Jijón v. Ecuador), Views adopted on 26 March 1992.

3.2 Counsel also claims that the author is a victim of a violation of article 14 paragraph 1, because the Court of Appeal failed to remedy the trial judge's misdirections to the jury on the issue of provocation. The withdrawal of the issue of provocation from the jury deprived the accused of a defence which could have led to a conviction under the lesser offence of manslaughter, and amounted to a denial of justice. In this respect reference is made to the Committee's jurisprudence.[38]

3.3 Counsel further submits that, when a barrister visited the author in prison in Jamaica the author informed him that he had been ill-treated while in detention, at St Catherine Police Station. The author claims to have been subjected to particularly rough treatment by the police officers upon arrest because he had been arrested for the murder of a police officer. He further claims that he was placed in a wet cell and forced to sleep on the floor. Some weeks after he had arrived some of the officers instructed another prisoner to beat him. Although his left eye was injured, he received no treatment until he appeared in court and the judge ordered the police to take him to a hospital. The author states in a letter to counsel that at some point after his arrest he was removed from his cell and placed in a cell "with the son of the man who in my self defence got killed in the matter between us. The son of the man and his friends thereupon attacked me in the cell immediately as the police officers put me with them". The author was treated at two public hospitals. Mr. Edwards, counsel who had represented the author at the preliminary hearing said that he remembered the incident; however, no documentation has been provided by Mr Edwards about the preliminary hearing with respect to this incident. The Jamaica Council for Human Rights also confirmed that the author had been treated, sometime in June 1983, at the Spanish Town Hospital and at the Kingston Public Hospital (Eye Clinic). On 22 February 1994, the author's counsel submitted a request to the Assistant Registrar of the Criminal Section of the Supreme Court in order to obtain the notes of the author's preliminary hearing. On 7 March 1994 he was informed that these could not be found.

3.4 Counsel submits that fundamental and basic requirements of the UN Standard Minimum Rules for the Treatment of Prisoners were not met during the author's detention at the St Catherine Police Station and that the treatment to which he was subjected while in detention, and the inadequate medical treatment he received, amount to violations of articles 7 and 10, paragraph 1, of the Covenant.

3.5 Counsel further submits that though the author did not pursue the matter of ill treatment while in detention this was for fear of reprisals, and stresses the ineffectiveness of the system, at the domestic level, in order to obtain redress. In this context, counsel argues that, since domestic remedies, and in particular the internal prison process and the complaints process of the Office of the Parliamentary Ombudsman, are not effective remedies, the requirements of article 5, paragraph 2 (b), of the Optional Protocol, have been met. In this respect counsel refers to the Committee's jurisprudence.[39]

3.6 Counsel points out that the author was held on death row for almost seven years. Reference is made to the decision of the Judicial Committee of the Privy

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[38] Communication No. 253/1987 (Paul Kelly v. Jamaica), where it was held that: "It is not in principle for the Committee to review specific instructions to the jury by the judge, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality."

[39] Communication No. 458/1991 (A. W. Mukong v. Cameroon), Views adopted on 21 July 1994.

Council in the case of Pratt and Morgan,[40] where it was held, inter alia, that it should be possible for the State party to complete the entire domestic appeals process within approximately two years. Counsel submits that the author's prolonged stay on death row amounts to a violation of articles 7 and 10, paragraph 1.

3.7 The author further claims a violation of articles 7, and 10, paragraph 1, because he was informed in January of 1987, that he was to be executed and was then placed in a death cell, where he remained for two weeks, before being returned to death row for another two years until his death sentence was commuted.

3.8 Finally, reference is made to the findings of a delegation of Amnesty International, which visited St. Catherine District Prison in November 1993. In Amnesty's report it is observed, inter alia, that the prison is holding more than twice the number of inmates for which it was constructed in the nineteenth century, and that the facilities provided by the State are scant: no mattresses, other bedding or furniture in the cells; no integral sanitation in the cells; broken plumbing, piles of refuse and open sewers; no artificial lighting in the cells and only small air vents through which natural light can enter; almost no employment opportunities available to inmates; no doctor attached to the prison so that medical problems are generally treated by warders, who lack proper training. It is submitted that the particular impact of these general conditions upon the author were that he was permanently confined to his cell except for an average of fifteen minutes a day and twice to empty out his slops bucket. His cell was infected with ants and other insects, he was only given a sponge with which to clean the cell. He further complained about the quality of the food and the sanitary conditions. The conditions under which the author was detained at St. Catherine District Prison are said to amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10, paragraph 1, of the Covenant.

3.9 Counsel contends that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Reference is made to the Human Rights Committee's jurisprudence.[41] Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, paragraph 2 (b) of the Optional Protocol.

State party's comments on admissibility and merits and counsel's comments thereon

4.1 In a submission of 3 November 1995, the State party waives the right to address the admissibility of the communication and addresses the merits of the author's claims. On the alleged violation of articles 7 and 10 (1) the State party refers to two incidents. In May 1983, the author was allegedly beaten leaving him with injuries to his left eye for which he received no medical treatment until ordered by the magistrate before whom he first appeared. The State party contends that there is a lack of written evidence to support the author's allegation, since the letter from the author's counsel is somewhat vague. It requested a copy of the letter London counsel had sent to Mr. Noel Edwards in Jamaica in order to ascertain exactly what it was that Mr. Edwards was confirming. It promised to respond to this allegation at a latter date, after investigating the matter. To date 6 July 1998 no further information has been received from the State party.

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[40] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

[41] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991; communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

4.2 The State party also responds to the second claim of a violation of articles 7 and 10 because the author had spent 4 years on death row and was then placed in the death cell reserved for inmates for whom a warrant for execution has been issued. The State party notes that: "the author spent two weeks in the death cell during which he suffered severe stress, and then a stay of execution was issued". It denies that these circumstances constitute a violation of the Covenant. Further, the State party contends that Pratt and Morgan v Attorney General of Jamaica, noted that if there was a delay of more than five years then there would be strong grounds for believing that the delay amounts to cruel and inhuman treatment. The period of four years in the present case does not fall within the time period which constitutes excessive delay. Furthermore, Pratt and Morgan may not be applied retroactively, and cannot therefore be applied to events which occurred in 1987.

4.3 On the issue of the author's stay in the death cell, the State party notes that: "it is natural that in those circumstances, the author would have felt some anxiety. This, however does not make it cruel and inhuman treatment to place him in a particular place, pending his legal execution. Nor does the fact that he spent two weeks there, while efforts were presumably made to have his execution stayed amount to a breach of articles 7 and 10 (1). Once a warrant for an execution has been issued, the Correctional Department Authorities are under a duty to take the relevant steps to carry out the execution. They should do so as humanly as possible, but the process set out for administrating a penalty is not contrary to the Covenant".

4.4 On the alleged violation of article 9, paragraph 2, since the author was arrested and only charged 3 days after his detention, the State party notes that there is no evidence that the author was not made aware of the offence for which he was detained. During this three day period the author was moved from the Chapelton Police Station to the Spanish Town Police Station to the Criminal Investigation Branch in Kingston, where he was formally placed under arrest. The State party notes that the author was placed under arrest formally at the Police Station most prepared to make the case against the author. This does not mean that before this time the author was ignorant, in a general sense, of the charges against him.

4.5 With respect to the allegation that he was not brought promptly before a judicial officer in violation of article 9, paragraphs 3 and 4, the State party claims that he was brought before a magistrate approximately one month after his arrest. It concedes that this period is longer than desirable but rejects that it constitutes a breach of the Covenant.

4.6 On the alleged violation of article 14, paragraph 1, because the Court of Appeal failed to remedy the trial Judge's misdirection on provocation and that the test laid down by the Court of Appeal was incorrect or alternately incomplete. The State party notes that it is a well established principle that issues of facts and evidence including the trial Judge's instruction are best left to be reviewed by the Court of Appeal. Only in exceptional cases where injustice is manifest should the Committee review these issues. In this case, the State party contends that there is nothing in it to take it outside this principle, since the review done by the Court of Appeal was quite adequate, and that there has been no breach of article 14.

5.1 By submission of 12 February 1996, counsel provides copy of the letter sent to Mr. Noel Edwards, the author's counsel in Jamaica, in order that the State party may be clear of exactly what it was that Mr. Edwards was agreeing to in his letter to counsel in London, concerning the incident of ill-treatment by police and lack of medical treatment for the author's eye injury.

5.2 Counsel refutes the State party contention that Pratt & Morgan is not a retroactive decision, since the Privy Council recommended that:

> "Rather than waiting for all those prisoners who have been on death row under sentence of death for five years or more to commence proceedings pursuant to Section 25 of the Constitution, the Governor General now refers all such cases to the JPC who, in accordance with the guidance contained in this advice, recommend commutation to life imprisonment, substantial justice will be achieved swiftly without provoking a flood of applications to the Supreme Court for constitutional relief pursuant to Section 17(1)".

It is therefore submitted that Pratt & Morgan was intended to assist those prisoners who had already served more than five years on death row and who had consequently been subjected to inhuman and degrading treatment. Counsel points out that the author has spent a total of 7 years on death row before his sentence was commuted to life imprisonment.

5.3 Counsel rejects the State party's contention that two weeks in a death cell, is not contrary to the Covenant, and reiterates the agony and stress suffered by the author in that period of time since the warrant of execution was read to him and the stay of his execution.[42] Counsel submits that if the State party is of the opinion that the relevant steps to carry out an execution should be done as humanely as possible then humanity must require that a man be kept in the death cell awaiting his execution for a reasonable period of time only. He reiterates that the two weeks the author spent in the death cell were excessive and in violation of his rights under the Covenant.

5.4 Counsel notes that the State party concedes that the author was only charged 3 days after his arrest and rejects the State party's argument that the author must have been aware of the charges in "a general sense", reiterating that there has been a violation of articles 9(2) and 14 (3)(a).

5.5 Counsel notes that the State party has also conceded that the author was not brought before a magistrate until approximately one month after his arrest and reiterates that this constitutes a violation of article 9, paragraphs 3 and 4 of the Covenant. Reference is made to the Committee's jurisprudence in this respect.[43]

5.6 Counsel reiterates the claims submitted in the original communication regarding unfair trial since the Court of Appeal did not remedy the trial Judge's misdirections to the jury on provocation.

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[42] Reference is made to the 1988 report of the Special Rapporteur on torture.

[43] See communication No. 253/1987 (Paul Kelly v. Jamaica), Views adopted on 8 April 1991.

Consideration of admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it its admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 15 December 1987, the author has exhausted domestic remedies for purposes of the Optional Protocol.

6.4 With respect to the author's allegations concerning unfair trial due to improper instructions from the judge to the jury withdrawing the issue of provocation from their consideration, and the failure of the Court of Appeal to remedy these, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. Pennant's trial suffered from such defects. In particular, it is not apparent that the judge's instructions on provocation were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7. The Committee accordingly, declares the remaining claims admissible and proceeds, without further delay, to an examination of the substance of these, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 Article 9, paragraph 2, of the Covenant gives the right to everyone arrested to know the reasons for his arrest and to be promptly informed of the charges against him. The author states that he went to the police station of his own accord on 1 May, 1983 and informed the officer in charge of his involvement in the death of Stephens. He was detained, transferred to another police-station and formally arrested and charged three days later. In these circumstances, when it must have been absolutely clear to the author that his detention and subsequent arrest were for involvement in the death of Stephens, the Committee cannot conclude that the author's right to be informed of the reasons for his arrest was violated. Furthermore, the author was formally charged with the murder of Stephens three days after first being detained, following what must have been an initial investigation. The duty to be promptly informed of the charges against one, as opposed to the reason for one's arrest, cannot arise until such charges have been determined. In the present case, it does not seem that a period of three days from the time of detention until formal charge of the author, amounted to a violation of his right to be promptly informed of the charges against him.

8.2 With regard to the author's claim under articles 9, paragraphs 3 and 4, and 14, paragraph 3 (a), the Committee notes that it is uncontested that the author was only first brought before a judge or other officer authorized by law to exercise judicial power one month after his arrest. It also notes that the State party has conceded that this period is undesirably long. Accordingly, the Committee concludes that the period between the author's arrest and his being brought before a judge was too long and constitutes a violation of article 9, paragraph 3, of the Covenant and, to the extent that this prevented the author from access to court to have the lawfulness of his detention determined, of article 9, paragraph 4.

8.3 With respect to the author's claim that he was beaten while in police custody and did not receive medical treatment until the committing magistrate ordered the police to take him to hospital, the State party has alleged that this complaint was vague and requested that counsel provide a copy of the letter sent to the author's counsel in Jamaica, requesting confirmation of the said incident. The Committee notes that despite having sent this letter to the State party on 15 March 1996 and the State party's promise to investigate the incident once it was clear which event counsel had confirmed, no information has been received. The Committee consequently considers that due weight must be given to the author's complaint to the extent to which it has been substantiated and accordingly, finds that the treatment the author received at the hands of the police while in detention is in violation of articles 7 and 10, paragraph 1, of the Covenant.

8.4 With regard to the conditions of detention at St. Catherine's District Prison, the Committee notes that the author has made specific allegations, about the deplorable conditions of his detention. He claims that he was permanently confined to his cell except for an average of 15 minutes twice everyday to empty his slops bucket. That his cell was infested with ants and other insects, that he only has a sponge with which to clean the cell. He also complained of the abysmal quality of the food and the sanitary conditions. The State party has not refuted these specific allegations. In these conditions, the Committee finds that confining the author under such circumstances constitutes a violation of article 10, paragraph 1, of the Covenant.

8.5 With regard to the author's claim that his prolonged detention on death row amounted to a violation of articles 7, and 10 paragraph 1, of the Covenant, the Committee reiterates its prior jurisprudence that prolonged detention on death row does not per se constitute cruel, inhuman or degrading treatment in violation of article 7 of the Covenant,[44] in the absence of further compelling circumstances.

8.6 With regard to the claim made by counsel that the author was placed in a death cell for two weeks after a warrant of execution was read to him. The Committee notes the State party's contention that it is to be expected that this would cause the author "some anxiety", and that the time spent there was because efforts were "presumably" being made to have his execution stayed. The Committee considers that in the absence of a detailed explanation by the State party as to the reasons for the author's two weeks stay in a death cell, this cannot be deemed to be compatible with the provisions of the Covenant, to be treated with humanity. Consequently, the Committee finds that article 7 of the Covenant has been breached.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of articles 7, 9 paragraphs 3 and 4, 10, paragraph 1, of the Covenant.

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[44] See the Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Pennant with an effective remedy, entailing compensation for the ill-treatment received and early release, especially in view of the fact that the author was already eligible for parole in December of 1996.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

O. Communication No. 649/1995, Forbes v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Winston Forbes (represented by Mr. S. Lehrfreund from Simons Muirhead and Burton, a law firm in London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	8 November 1994 (initial submission)
Date of decision on admissibility:	20 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No.649/1995 submitted to the Human Rights Committee by Winston Forbes, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Winston Forbes, a Jamaican national, currently serving a prison term at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 2, paragraph 3; 7; 9, paragraphs 2, 3 and 4; 10, paragraph 1; and 14, paragraph 3 (b) and (d), of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the London law firm Simons Muirhead & Burton.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Facts as submitted by the author

2.1 The author was convicted of the murder of one Michael Brown and sentenced to death on 25 January 1984, by the Home Circuit Court, Kingston, Jamaica. His appeal was dismissed by the Court of Appeal of Jamaica on 20 February 1987. On 21 June 1993, the author's petition for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed. The author's death sentence has been commuted.

2.2 The case for the prosecution was that, on 6 May 1982, at 18.00, the author went to the Crystal Theatre, argued with Michael Brown about politics, and then left. Later in the evening, at 20.00, when the author returned and tried to enter without paying, an argument broke out between him and Michael Brown. The author then left. Brown and the theatre manager called the police, who came, made inquires and left. A few minutes after the police had left, the author returned, remonstrated with Mr. Brown and shot him.

2.3 During the trial, Franklin White testified that, on 6 May 1982, at around 19.00, the author went to the theatre and tried to enter without paying. When chided by Mr. Brown, the author grabbed him by the collar and threatened him saying "You want me shoot you", then left. He further testified that Mr. Brown and the theatre manager called the police. Just after the police had gone the author returned and rebuked Brown saying "you call the police on me" and shot him. The deceased was sitting in the cashier's booth at the entrance of the theatre, next to Eustance Stephenson.

2.4 Eustance Stephenson identified the author during the trial and testified that he had been at school with him. The witness further testified that at the time of the murder, at 9.35 p.m. he had been sitting next to the deceased in the cashier's booth.

2.5 A third witness Alvin Comrie also testified to having seen the murder from where he was standing just inside the theatre.

2.6 Leslie Ashman, the investigating officer of the Spanish Town Police Station, testified that he obtained a warrant for the author's arrest; on 31 May 1982, he arrested and charged him with the murder of Michael Brown. He further testified that the author claimed to be called Paul Wright from Central Village; however, Newton Forbes, the author's father, who was present at the police station, identified him as his son.

2.7 The author gave sworn evidence, admitting to having been to the Crystal Theatre at around 18.00 and arguing about politics with Michael Brown, but denying that he had returned and shot him. He testified that he had gone to his father's shop at about 20.30 and stayed there all night. Since the author denied having committed the murder, the issue at the trial was one of identification and the defence was solely directed at the witnesses' credibility and their ability, given the lighting in the theatre hall at the time of the incident, to correctly identify the author. The author was represented by a legal aid attorneys. The only witness called to testify on the author's behalf was his father who testified that the author had been with him from 20.30 to around 23.00 hours.

The complaint

3.1 It is stated that the trial, which started on 23 January 1984, took longer than both the trial judge and counsel had expected. On the morning of 24 January 1984, the trial judge had to send away a number of jurors in waiting who had been summoned for that day to attend another trial saying "Members of the jury in waiting we thought we'd do another case this morning, but we thought wrongly ...". Further just before the lunch recess on 24 January 1984, while the author was giving his evidence in chief to the jury, senior counsel addressed the judge and explained that he had committed himself to attending a funeral at three o'clock; after a short discussion, it was agreed that senior counsel would finish the examination in chief and that junior counsel should re-examine. However, after the lunchtime recess, junior counsel continued the examination in chief and senior counsel re-examined, being excused by the judge at 14.32. Counsel submits that the author was deprived of proper representation at a very important stage of his trial, because his senior legal aid counsel put a personal engagement before his professional duty, his evidence in chief to the jury being unexpectedly and improperly interrupted; this is said to amount to a violation of article 14, paragraph 3 (d), of the Covenant.

3.2 Counsel claims that had the author known that senior counsel was going to leave early he would have asked that counsel request an adjournment. Counsel refers to the Committee's jurisprudence[45] and submits that what took place at the trial was a material irregularity in the conduct of the same and amounts to a violation of article 14, paragraph 3 (b), of the Covenant.

3.3 In an affidavit, dated 27 October 1994, the author claims that he spent about two weeks in detention before he was charged for murder, without seeing a lawyer. On 14 May 1982, the author was taken into custody at Ochos Rios Police Lock-Up. He was later transferred to Admiral Town Police Station, before he was moved to the Spanish Town Lock-Up, where he was charged and arrested on 31 May 1982. He claims that it took a further two weeks for him to be brought before a judge. It is submitted that this constitutes a violation of article 9, paragraphs 2, 3 and 4, of the Covenant. In this respect counsel refers to the Committee's jurisprudence and General Comments.[46]

3.4 The author claims, in a letter sent to counsel in London, that he was ill-treated while in detention at Spanish Town Lock-Up; stating "I was severely beaten by two police officers who used a baton to hit me in my head and continued punching me all over my body. I informed my family of the ill-treatment and they arranged for the doctor, Dr. Richard, to examine me at the Spanish Town Lock-Up. Although I was badly bruised and cut, the doctor confirmed that I had no broken bones". The author explains that this police brutality was not brought to the attention of his lawyer at the preliminary hearing because so much time had elapsed.

3.5 Counsel submits that fundamental and basic requirements of the UN Standard Minimum Rules for the Treatment of Prisoners were not met during the author's detention at the Spanish Town Lock-Up and that the treatment to which he was subjected while in detention and the inadequate medical treatment he received amount to violations of articles 7 and 10, paragraph 1, of the Covenant. Counsel points out that the author did not bring the matter to the attention of his lawyer due to the lapse of time, and stresses the ineffectiveness of the system, at the domestic level,in order to obtain redress. Counsel concludes that, since domestic remedies, and in particular the internal prison process and the complaints process of the Office of the Parliamentary Ombudsman, are not effective remedies, the requirements of article 5, paragraph 2(b), of the Optional Protocol, have been met. In this respect counsel refers to the Committee's jurisprudence.[47]

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[45] Communication No. 356/1989, (Trevor Collins v. Jamaica), Views adopted on 25 March 1993.

[46] General Comment No. 8; communication No. 336/1988 (Andres Fillastre v. Bolivia), Views adopted on 5 November 1991; communication No. 253/1987, (Paul Kelly v. Jamaica), Views adopted on 8 April 1991; communication No. 277/1988, (Terán Jijón v. Ecuador), Views adopted on 26 March 1992.

3.6 Counsel points out that the author was held on death row for over eleven years; reference is made to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan,[48] where it was held, inter alia, that it should be possible for the State party to complete the entire domestic appeals process within approximately two years. Counsel submits that the author's prolonged stay on death row amounts to a violation of articles 7 and 10, paragraph 1.

3.7 Finally, counsel alleges a violation of articles 7 and 10, paragraph 1, on the grounds of the conditions of his detention both prior to and after his conviction. As to the latter, reference is made to the findings of a delegation of Amnesty International, which visited St. Catherine District Prison in November 1993. In Amnesty's report it is observed, inter alia, that the prison is holding more than twice the number of inmates for which it was constructed in the nineteenth century, and that the facilities provided by the State are scant; no mattresses, other bedding or furniture in the cells; no integral sanitation in the cells; broken plumbing, piles of refuse and open sewers; no artificial lighting in the cells and only small air vents through which natural light can enter; almost no employment opportunities are available to inmates; no doctor is permanently attached to the prison so that medical problems are generally treated by warders who lack proper training. It is submitted that the particular impact of these general conditions upon the author were that he was confined to his cell for twenty-three hours and forty-five minutes every day. He spent most of the day isolated from other men, with nothing to keep him occupied. Much of the time he spent in enforced darkness. He further complained about the quality of the food and the sanitary conditions. The conditions under which the author was detained at St. Catherine District Prison are said to amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10, paragraph 1, of the Covenant.

3.8 Counsel contends that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Reference is made to the precedent set by the Judicial Committee of the Privy Council[49] and to the Human Rights Committee's jurisprudence.[50] Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.

3.9 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

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[47] Communication No. 458/1991 (A. W. Mukong v. Cameroon), Views adopted on 21 July 1994.

[48] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

[49] DPP v. Nasralla and Riley et al v. Attorney General of Jamaica.

[50] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

State party's information and observations and counsel's comments thereon

4.1 In its observations of 19 October 1995, the State party does not formulate objections to the admissibility of the case and offers, "in the interest of expediting the Committee's processing of the application", comments on the merits of the communication.

4.2 With regard to the alleged violation of article 9 on the ground that the author had not been informed of the charges against him until ten days after his arrest, the State party denies that this occurred. It is submitted that there is no evidence that the author, at the time of his arrest, was not made aware of the general reasons for his arrest.

4.3 With regard to the alleged violation of article 9 on the ground that the author was not brought before a Magistrate until two weeks after his detention, the State party admits that two weeks is longer than desirable, but does not accept that article 9 was violated. It is submitted that "part of the reason for the delay was the transfer of the author from Ochos Rios Police Lock-up to Spanish Town Lock-up."

4.4 As to the author's claim that article 14, paragraphs 3(b) and 3(d), were violated because on the last day of his trial, senior counsel had to leave due to a personal engagement and left junior counsel to examine in chief the author's only alibi witness and to address the jury, the State party contends that the State is not responsible for the conduct of a case by counsel. The State party submits that the State's responsibility is to provide competent counsel to represent an accused person, and argues that junior counsel in this case was a competent attorney who had been actively involved in the preparation of the case, and in the opinion of the senior counsel was well able to perform the duties given to him.

4.5 With regard to the alleged violations of articles 7 and 10 on the ground that the author was beaten by a police officer at the Spanish Town Lock-up, the State party denies that such a incident occurred. The State party argues that the author has no independent evidence to confirm the fact that he was injured. He states that he was seen by a doctor provided by his family, but has not produced a medical report or any other documentary evidence confirming his injuries. Furthermore, the State party points out that the preliminary inquiry began in August 1982, whilst the alleged beatings occurred after the author's arrest on 31 May 1982, and yet the author did not inform his attorney of the incident. The State party submits that in these circumstances, the credibility of the author's allegation is debatable.

4.6 As to the author's claim that articles 7 and 10 were violated as the author was in detention on death row for a period of more than 10 years, the State party submits that a prolonged stay on death row per se does not automatically constitute cruel and inhuman treatment, but that the facts of each case must be examined according to the applicable legal principles.

5.1 In his comments of 9 January 1996 on the State party's submission, counsel agrees to the joint examination of the admissibility and the merits of the case. He reaffirms that his client is a victim of a violation of article 9, paragraph 2, on the ground that the author was not made aware of the general reasons for his arrest before two weeks after his arrest. It is submitted that evidence for this is placed before the Committee, as the author in a sworn Affidavit on 27 October 1994 stated that "I spent two weeks in detention before I was charged with murder." Counsel further argues that the State party's denial is not supported by any positive evidence countering the Affidavit of the author.

5.2 Counsel also reaffirms that his client is a victim of a violation of article 9, paragraphs 3 and 4, as he was not brought before a Magistrate before two weeks after his detention. Counsel argues that the word "promptly" must be interpreted as not to permit a delay of more than two or three days. Reference is made to the Committee's jurisprudence.

5.3 As to the alleged violation of article 14, paragraphs 3(b) and 3(d), counsel reiterates that it is axiomatic that legal assistance be made available in capital cases and that once assigned, legal assistance must provide effective representation. It is submitted that the duty of the State party goes further than merely providing legal assistance in a capital case and that their duty must be to provide effective representation. Reference is made to the Committee's jurisprudence.

5.4 As to the alleged violation of articles 7 and 10 on the ground that the author was beaten during his pre-trial detention at Spanish Town Lock-Up, counsel submits that in the circumstances that prevail within the prisons and lock-ups in Jamaica, it is extremely difficult for an inmate to substantiate allegations of ill-treatment by making complaints directly to the prison authorities due to the fear of reprisals. Reference is made to reports by the Ombudsman of Jamaica and Amnesty International. It is also submitted that evidence of the beatings is placed before the Committee as the allegations are contained in the author's Affidavit of 27 October 1994 and in his letters to counsel of 7 September 1993, 27 July 1994 and 29 August 1994.

Consideration of admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 21 June 1993, the author has exhausted domestic remedies for purposes of the Optional Protocol. The Committee notes that the State party has not raised objections to the admissibility of the complaint and has forwarded comments on the merits so as to expedite the procedure. The Committee, accordingly, decides that the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 With respect to the author's claim that he is a victim of a violation of article 14, paragraphs 3(b) and 3(d), as senior counsel on the last day of the trial proceedings had to leave the court on a personal engagement and thereby left to junior counsel the remainder of the examination-in-chief of the author, the examination-in-chief of the author's only alibi witness, and the closing argument, the Committee recalls its prior jurisprudence where it has held that the State party cannot be held accountable for any alleged deficiencies in the defence of the accused or alleged errors committed by the defence lawyer, unless it should have been manifest to the court that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, the information in the file does not support an allegation that junior counsel was not qualified to give effective, legal representation. It is clear that it was both senior counsel's and the trial judge's opinion that the remainder of the defence was left in capable hands. The file shows that junior counsel was a qualified lawyer, and that he had worked closely with senior counsel in the preparation of the case. The trial transcripts show that he had conducted the cross-examination of several of the Prosecution's witnesses earlier in the proceedings. In the circumstances, the Committee concludes that there has been no violation of article 14 of the Covenant.

7.2 Article 9, paragraph 2, of the Covenant gives the right to everyone arrested to know the reasons for his arrest and to be promptly informed of the charges against him. Article 9, paragraph 3, gives anyone arrested or detained on a criminal charge the right to promptly be brought before a competent judicial authority. The author contends that he was not informed of the reasons for his arrest until two weeks after he was first arrested, and that it took a further two weeks before he was brought before a magistrate. The author claims to have been detained at the Ochos Rios Police Lock-Up in May 1982, and that he was later transferred to the Admiral Town Police Station in Kingston before he on 31 May 1982 was taken to Spanish Town Lock-Up where he was officially charged with the murder. The author claims that he was originally detained at least 14 days before he was officially charged. The State party denies that the author during this period was unaware of the general reasons for his arrest. However, the State party does not deny that from the arrest of the author at least 14 days passed before he was brought before a magistrate. According to the State party, part of the reason for the delay was the transfer of the author from Oche Rhos Police Lock-Up to Spanish Town Lock-Up. In the circumstances, and notwithstanding the State party's arguments, the Committee finds that to detain the author for a period of 14 days before bringing him before a competent judicial authority constitutes a violation of article 9, paragraph 3, of the Covenant.

7.3 As to the author's claim that he is a victim of a violation of articles 7 and 10, paragraph 1, on the ground that he was severely beaten by two police officers while at Spanish Town Lock-Up, the Committee notes both that the author has not given any medical evidence of such an occurrence, and that he has failed to bring these allegations to the attention of his former lawyers and the courts. The author has explained that this failure was due partly to the lapse of time from the occurrence until he obtained counsel, and partly to the fear of reprisals. The Committee notes, however, that the author in his statement of 8 September 1994 claims that the beatings occurred in July of 1982, and that he in his letter of 7 September 1993 claims that he had contact with his counsel, Mr. Robert Pickersgill, several times before the preliminary hearings started in August 1982. Subsequently, there does not appear to have been much of a lapse of time from the alleged beatings until the author obtained contact with his lawyer. The Committee also notes that the author soon after the alleged beatings was moved from Spanish Town Lock-Up to the General Penitentiary, and therefore any fear of reprisal should have been reduced. In these circumstances, on the basis of the information before it, the Committee concludes that the author has not substantiated his claim and, accordingly, there is no basis for finding a violation of articles 7 or 10 on the ground of beatings. Consequently, the Committee also finds that there is no basis for finding a violation of articles 7 and 10 on the ground of inadequate medical treatment during the author's detention at Spanish Town Police Lock-Up.

7.4 The Committee must determine whether the length of time the author spent on death row - more than 11 years - amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant. Counsel has claimed a violation of these provisions by reference to the length of time the author was confined to death row. It remains the Committee's jurisprudence that detention on death row for a specific time does not violate articles 7 and 10, paragraph 1, in the absence of further compelling circumstances. The Committee refers, in this context, to its Views on communication No. 588/1994[51] in which it explained and clarified its jurisprudence on this issue. In the Committee's opinion, neither the author nor his counsel have shown the existence of further compelling circumstances beyond the length of detention on death row. While a period of detention on death row of over eleven years is a matter of serious concern, the Committee finds that it does not per se constitute a violation of articles 7 and 10, paragraph 1.

7.5 The author has alleged violations of articles 7 and 10, paragraph 1, on the grounds of the conditions of his pre-trial detention at the General Penitentiary and his detention at St. Catherine's District Prison. The Committee notes that the author, as to the conditions of detention in St. Catherine's District Prison, in his original communication made specific allegations regarding the deplorable conditions of detention. He alleged that he throughout his detention there has spent twenty-three hours and forty-five minutes each day in solitary confinement, with nothing to keep him occupied, and in enforced darkness. The State party has made no attempt to refute these specific allegations. In these circumstances, the Committee takes the allegations as proven. It finds that holding a prisoner in such conditions of detention constitutes a violation of article 10, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 9, paragraph 3, and 10, paragraph 1.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Forbes with an effective remedy including compensation. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subjected to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[51] Errol Johnson v. Jamaica, Views adopted on 22 March 1996, paras. 8.2-8.5.

P. Communication No. 653/1995, C. Johnson v. Jamaica (Views adopted on 20 October 1998, sixty-fourth session)*

Submitted by:	Colin Johnson (represented by Saul Lehrfreund from the London law firm of Simons Muirhead and Burton)
Victim:	The author
State party:	Jamaica
Date of communication:	13 September 1995 (initial submission)
Date of decision on admissibility:	20 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Having concluded its consideration of communication No. 653/1995 submitted to the Human Rights Committee by Mr. Colin Johnson, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Colin Johnson, a Jamaican citizen currently imprisoned in the General Penitentiary, Kingston, Jamaica. The author claims to be a victim of violations by Jamaica of articles 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund, of the London Law firm, Simons Muirhead & Burton.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Facts as submitted by the author

2.1 On 5 April 1984, the author was arrested and charged with the murder of one Winston Davidson on 23 March 1984. On 23 September 1985, the trial against the accused started in the Home Circuit Court. On 26 September 1985, the author was found guilty of murder and sentenced to death. The Court of Appeal of Jamaica refused the author's Application for Leave to Appeal on 20 May 1987. An application for Leave to Appeal to the Privy Council was filed in the Court of Appeal on 1 July 1987, but the matter was adjourned "sine die". Counsel reformulated the point of law with which the Court had been dissatisfied and relisted the notice of motion on 4 November 1987. Nevertheless, the matter remained "sine die" on the records of the Court of Appeal.

2.2 On 26 July 1988, the Committee declared an earlier communication submitted by the author inadmissible because of non-exhaustion of domestic remedies, since it appeared from the information before the Committee that the author had failed to petition the Judicial Committee of the Privy Council for special leave to appeal.[52] The decision provided for the possibility of review of admissibility, pursuant to rule 92, paragraph 2, of the Committee's rules of procedure. On 26 July 1993, the author's petition for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed. It is therefore submitted that all available domestic remedies have been exhausted.

2.3 On 18 December 1992, the author's offence was classified as non-capital murder under the Offences Against the Person (Amendment) Act 1992. The length of term to serve before becoming eligible for parole is 20 years.

2.4 The author submits that he has not filed a constitutional motion, since no legal aid is available in Jamaica for this purpose. In this connection, the author refers to the Committee's jurisprudence and submits that the application should therefore be admissible under the Optional Protocol.

2.5 The case for the prosecution was based on the evidence of one eye witness of events, the deceased's cousin, Kenneth Morrison. He gave evidence to the effect that he was working at his fish stall in the morning of 23 March 1984 when his cousin, Winston Davidson, passed by and had a brief conversation with him. At this point his cousin was uninjured. Winston Davidson then continued and went out of the witness's sight. About five minutes later, Kenneth Morrison heard three to four gunshots from the direction of where his cousin had gone. Three to five minutes later he saw the deceased running back. Three yards behind were the author, the author's brother and his sister who were pursuing Winston Davidson. Colin Johnson was carrying a gun pointing it at the deceased. Davidson was not carrying anything in his hand; he was wounded with blood coming out of his mouth and stomach. When Colin Johnson saw the witness he stopped and, after the witness had occasion to see him from a distance of about 15 to 20 yards for a moment, Colin Johnson, his brother and sister disappeared. Winston Davidson continued running; he was then put into a car and taken to hospital. At this point he was still alive. A pathologist gave evidence that Winston Davidson was dead on examination at the hospital later on 23 March 1984.

2.6 Kenneth Morrison's evidence was that he had known the defendant for about seven years. He was a friend of the defendant and saw him almost every day.

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[52] Communication No. 252/1987, declared inadmissible on 26 July 1988, at the Committee's thirty-third session.

Kenneth Morrison first made a statement to the police on 5 April 1984. He stated that the reason he had not been to the police earlier was that he was frightened of making a statement until the suspect was in custody.

2.7 At the trial, a detective corporal gave evidence that he arrested Colin Johnson on 5 April 1984. After telling the accused that he was wanted by the police in connection with a murder that had occurred in a certain area of Kingston, Colin Johnson replied:

> "Mr. Cassell, ah the bwoy first shoot at me sah.".

Cassell's evidence was that he had written down this comment at the time on a scrap of paper. Colin Johnson did not sign this piece of paper. Cassell never wrote it down in an officer's notebook and since had been unable to find it. Cassell admitted in cross examination that the area in question was an area with a high crime rate and frequent gun violence. Sergeant Lloyd Hayley, an officer in the case who had taken Colin Johnson into custody, gave evidence that he had arranged a confrontation between Colin Johnson and the witness, Morrison.

2.8 The case for the defence was based on alibi; the author made an unsworn statement from the dock saying that he was not in the area in question on the day of the crime. He called no witnesses in support of his alibi. He denied that he had said

> "Ah the bwoy first shoot at me sah."

on arrest. He alleged that Kenneth Morrison was lying when he said that he had seen him running after the deceased. He said that he had worked with Morrison in 1982 on a building site. Both Colin Johnson and Kenneth Morrison had been suspected of selling materials from the site. Morrison had been held responsible and dismissed. Kenneth Morrison had since held a grudge against him; hence his motivation for lying in Court.

2.9 Colin Johnson called one witness in his support, Wesley Suckoo. His evidence was that he had driven Winston Davidson to hospital on 23 March 1984 and that during the journey the dying man told him who it was who shot him and that this person was not Colin Johnson.

The complaint

3.1 The author claims that the trial against him was unfair and partial. He submits that the judge misdirected the jury in failing to give a general warning as to the dangers of relying on identification evidence. Such a warning would have been particularly important in the present case as the distance between the witness and the accused of 15 to 20 yards would have been sufficiently far for there to be at least the real possibility of mistake. It is stated that the judge also failed to remind the jury that it is possible for a honest witness to be a mistaken witness.

3.2 Further, it is claimed that the judge, in his summing-up, cast serious doubts on the credibility of the defence witness and treated the evidence of the chief prosecution witness, Kenneth Morrison, in a favourable way. In this connection, it is submitted that, during the cross-examination of the driver of the car that brought Davidson to hospital, the judge intervened 58 times in a manner which allegedly violated his duty of impartiality. Counsel claims that this deprived the author of having his defence considered fairly, impartially and objectively by the jury.

3.3 It is also alleged that the judge deprived the applicant of a chance of acquittal when he directed the jury that it was an unreasonable inference on the basis of the evidence to conclude that someone else shot Mr. Davidson.

3.4 Finally, it is submitted that the judge expressly withdrew the issue of self defence from the jury, even though the issue was raised in the evidence of the prosecution. Counsel states that the trial judge has a duty to explain and to leave possible defences to the jury even when not raised by the defence. It is therefore submitted that for the above-mentioned reasons, the author is a victim of a violation of article 14, paragraph 1 of the Covenant.

3.5 The author further submits that he was beaten by five warders on 20 November 1986 whilst detained on death row in St. Catherine District Prison, Jamaica. He states that his hand was broken. Approximately three weeks after the incident he was admitted to hospital for treatment. Until this time he was denied medical attention. Upon receipt of a letter by Colin Johnson dated 3 December 1986, his Jamaican attorney telephoned the superintendent in charge of St. Catherine District Prison and informed him of the report received concerning Mr. Johnson and asked for a complete investigation of the matter. The Jamaican attorney never received a response, although one was promised. The author also contacted the prison superintendent himself, the Ombudsman of the Jamaican Parliament and the Jamaica Council for Human Rights. The Ombudsman answered that he had received a letter of the Department of Correctional Services, dated 4 December 1989, in which it is confirmed that three death row inmates, among whom was the author, had been party to an insurrection on 20 November 1986. As a result of that incident the authorities had used force to quell the uprising. The inmates were treated by the Institution's Doctor for the injuries documented on their medical record. The record for Colin Johnson, however, showed no evidence of him receiving any medical treatment on the day in question. It is submitted that this letter shows that the author was subjected to ill-treatment on 20 November 1986 and that he furthermore did not receive any medical treatment on that day.

3.6 It is further stated that three death row inmates died as a result of injuries inflicted during a prison disturbance on 28 May 1990. In August 1991, during the investigation relating to this matter, several other inmates reported to have been injured by warders during the quelling of the disturbance. In this context, the author's mother, Mrs. Hazel Bowers stated in a sworn affidavit taken on 8 June 1990, that her son "appeared to be very frightened", that he had told her that the warders had reportedly threatened to kill as many inmates as possible, since they would not rely on the government to carry out the executions. They had beaten the men with "iron pipes, big sticks, batons and whatever implements they could get hold on". Mrs. Bowers stated that since the killings, the death row inmates were"living in fear of losing their lives at the hands of the warders" and that her son had appealed to the Jamaica Council for Human Rights to intervene on the inmates' behalf. It is submitted that the suffering endured by Johnson, who was being forced to live in an atmosphere of violence, constantly feeling vulnerable or afraid, amounted to inhuman treatment, in breach of article 7 and 10, paragraph 1, of the Covenant.

3.7 Until his reclassification as a non-capital offender in December 1992, the author was on death row for a period of over 7 years. Counsel argues that the mere fact that the author will no longer be executed does not nullify the mental anguish for the 7 years facing the prospect of being hanged. It is submitted that the death row incarceration can constitute inhuman and degrading treatment, the so-called "*death-row phenomenon*", *which is recognised by the jurisprudence of various* courts.[53]

3.8 It is stated that Mr. Johnson's cell on death row measured 6' x 9', and was poorly lit with long periods spent in almost total darkness; there was only a concrete slab for sleeping and no integral sanitation. It is submitted that these factors are sufficient in themselves to constitute breaches of articles 7 and 10, paragraph 1, of the Covenant.

3.9 The author states, referring to Amnesty International's report of December 1993 on a "Proposal for an Inquiry into Deaths and Ill-Treatment of Prisoners in St. Catherine District Prison", that serious complaints by prisoners have apparently not been acted upon and that the Ombudsman office does not have the powers of enforcement and that its recommendations are non-binding. It is therefore submitted that, with respect to his claims under articles 7 and 10 of the Covenant, Colin Johnson has satisfied the requirements of article 5, paragraph 2 (b), of the Optional Protocol, due to the inadequacy of the domestic complaints process.

State party's information and observations and author's comments thereon

4.1 In its submission, dated 3 May 1996, the State party with respect to the allegation of prolonged detention on death row contends that on the basis of the Committee jurisprudence in the decision of Pratt and Morgan v. Jamaica, it does not accept that a prolonged stay on death row per se constitutes cruel and inhuman treatment. Each case must be examined on its own facts. Consequently, it rejects a violation of the Covenant. With respect to the allegation of ill-treatment by warders in 1987 and the denial of medical treatment after the beatings the State party has promised to investigate the matter to date, 6 July 1998, no further information has been received by the Committee.

4.2 With respect to the allegations of unfair trial arising from the judge's directions to the jury on identification evidence and the judge's withdrawal of self-defence from the jury, in violation of article 14, paragraph 1, of the Covenant, the State party refers to the Committee's own jurisprudence, with regard to the evaluation of facts and evidence.

5. In his comments, dated 20 June 1996, counsel points out that the State party has not addressed all the claims and has promised an investigation. In this respect, counsel states that the State party has not rebutted the allegations regarding the author's ill-treatment while on death row at St. Catherine District Prison, in particular the incident of 20 November 1996 where the author's hand was broken. Counsel also refers to an incident, on 28 May 1990, where the author saw three inmates being beaten to death this had led him to subsequently live in fear of losing his own life at hands of warders.

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[53] Reference is made to the European Court of Human Rights in the Soering case (judgement of 7 July 1989, Series A, Volume 161), to the Indian Supreme Court (Rajendra Prasad v. State of Uttar Pradesh, 1979 3 SCR 329), to the Zimbabwe Supreme Court (Catholic Commissioners for Peace and Justice in Zimbabwe v. Attorney General, 14 HRLJ (1993), p. 231) and to the Judicial Committee of the Privy Council (Pratt & Morgan v. Attorney General of Jamaica (1993) 4 All ER 769).

Consideration of admissibility and examination of the merits

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that with the dismissal of the author's petition for special leave to appeal by the Judicial Committee of the Privy Council on 26 July 1993, the author has exhausted domestic remedies for purposes of the Optional Protocol. In the circumstances of the case, the Committee is not aware of any obstacle to the admissibility and finds it expedient to proceed with the examination of the merits of the case. In this context, it notes that the State party has not contested the admissibility of the communication and has proceeded to comment on the merits.

6.4 With respect to the author's claims about irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of identification, the Committee reiterates that, while article 14 guarantees the right to a fair trial, it is not for the Committee to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The material before the Committee does not show that the judge's instructions suffered from such defects. Accordingly, this part of the communication is inadmissible as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol.

7. The Committee declares the remaining claims admissible and proceeds, without further delay, to an examination of the substance of these claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

8.1 The Committee must determine whether the length of the author's detention on death row, over seven years, under allegedly deplorable circumstances, at St. Catherine district Prison, violated article 7 of the covenant. It remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of articles 7 and 10, paragraph 1, of the Covenant in the absence of some further compelling circumstances. The author has related two incidents which occurred on 20 November 1986 and 28 May 1990, where he was beaten by warders and lack of medical treatment as well as threats to his life, which he documented in complaints to his counsel in Jamaica, the prison superintendent, the Parliamentary Ombudsman of Jamaica and to the Jamaica Council for Human Rights. The State party has promised to investigate these claims, but has failed to forward to the Committee its findings, almost two years after promising to do so. In these circumstances, in the absence of any information from the State party, the Committee finds a violation of article 7 of the Covenant.

8.2 The author has also made specific allegations, about the deplorable conditions of his detention. He claims that he is kept in a poorly lit cell of 6 by 9 feet, with only a concrete slab to sleep on, and no integral sanitation. The Committee considers that the treatment described by the author is in violation of the State party's obligation under article 10, paragraph 1, of the Covenant, to treat prisoners with humanity and with respect for the inherent dignity of the human person.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of articles 7 and 10, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide the author with an effective remedy including compensation. The Committee urges the State party to take effective measures to carry out an official investigation into the beating by wardens with a view to identify the perpetrators and punish them accordingly, and to ensure that similar violations do not occur in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it continues to be subject to the application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals with its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 662/1995, Lumley v. Jamaica (Views adopted on 31 March 1999, sixty-fifth session)*

Submitted by:	Peter Lumley
Victim:	The author
State party:	Jamaica
Date of communication:	24 August 1993
Prior decision:	Special Rapporteur's rule 91 decision, transmitted to the State party on 14 November 1995
Date of decision on admissibility:	31 March 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1999,

Having concluded its consideration of communication No. 662/1995 submitted to the Human Rights Committee by Mr. Peter Lumley under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Peter Lumley, a Jamaican citizen currently incarcerated at the South Camp Rehabilitation Centre, Jamaica. He claims to be the victim of violations by Jamaica of articles 2, paragraph 1; 14, paragraphs 3 (d) and (e), and 5, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

Facts as submitted by the author

2.1 On 16 September 1987, the Kingston Circuit Court convicted the author of robbery and assault and sentenced him to 15 years for the robbery, and 9 years for the assault, to run concurrently. An application for leave to appeal filed on his behalf was dismissed by the Court of Appeal of Jamaica on 28 November 1988. The author has not filed a Petition for special leave to appeal to the Judicial Committee of the Privy Council.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by two Committee members is appended to the present document.

2.2 The author provides a few details of his trial "from memory", as he has been unable to secure the trial transcripts despite repeated attempts. The author states that he was arrested on 11 July 1986 and held for several nights in detention without being informed of any charges. He was identified by one of two witnesses in a line-up. At the preliminary hearing which followed in October 1986 at the Half Way Tree Magistrate's Court, the witness and the alleged victim of the crime provided evidence which was later modified at trial. The author states that at the preliminary hearing it was said that he entered a "shut down" house in which he found a woman, whom he grabbed around the stomach from behind and allegedly held for "two or three minutes". She, meanwhile, was attempting to assist a female friend who lay unconscious on the floor. At trial evidence was given that the door of the house was "open", and that rather than the friend being on the floor, she was outside the house, and was called in. The author states that the victim of the assault testified that she was stabbed several times.

2.3 The author was represented at the preliminary hearing by paid counsel, and at trial by counsel's "girlfriend". The author states that he was charged with wounding with intent, aggravated robbery, and assault. He was convicted on the lesser charges of robbery and assault. He states that he is innocent and knows nothing of the incident.

2.4 On 28 November 1988, the author learned that an appeal filed on his behalf was that day refused. He states that he was not aware of who represented him on appeal, as he had written to his former counsel who had not responded, and to the Jamaica Council for Human Rights. The author wrote to the Parliamentary Ombudsman in Kingston on 10 December 1988 and received a reply on 26 January 1989, in which he was informed of the means of application for leave to appeal to the Privy Council.

2.5 Between 30 April 1988 to 29 June 1992, the author exchanged several communications with the Jamaica Council for Human Rights, which on his behalf requested the trial transcript from the court in order to determine how best to advise him. He further claims that he himself made numerous requests for the trial transcript. The author states that the last communication he received from the Council was on 29 June 1992, in which the Council stated that it been advised by the Court that the transcript was available. The author has since heard nothing further either from the Court or the Council.[54]

The complaint

3.1 The author submits that he is the victim of a violation of article 14, paragraphs 3 (d) and (e), and 5, since as he was not aware that the Court of Appeal was going to examine his petition for leave to appeal and as he was not informed of who was representing him on appeal, he was unable to prepare his defence. He also contends that he was not given an opportunity to examine or have examined the witnesses against him.

3.2 The author additionally submits that he is the victim of a violation of article 2, paragraph 1 of the Covenant in connection with article 2 of the Optional

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[54] The Jamaica Council for Human Rights informed the Secretariat on 31 July 1995 that it was in possession of the trial transcript, but that it would be unable to represent Mr. Lumley regarding any appeal of sentence, because it has to limit itself to represent capital prisoners only.

Protocol because Jamaica thwarted his attempts to obtain legal assistance to file a Petition for special leave to appeal to the Judicial Committee of the Privy Council by unreasonably delaying the provision of a copy of his trial transcript despite numerous requests. He contends that Jamaica has effectively deprived him of the possibility of submitting a communication to the Human Rights Committee in accordance with article 2 of the Optional Protocol, as without access to the trial transcript it is impossible for the author's legal representatives to ascertain whether the criminal proceedings concerning the author were carried out in accordance with article 14 and other provisions of the Covenant.

3.3 The author submits that he has exhausted all domestic remedies. It is submitted that following many years of attempting to obtain the trial transcripts, and to obtain legal representation to file a Petition for special leave to appeal, the Government's refusal constitutes a "prolonged delay" under article 5, paragraph 2 (b) of the Optional Protocol.

3.4 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

State party's observations and author's comments

4.1 By submission of 9 January 1996, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, since the author has not filed an application for leave to appeal to the Judicial Committee of the Privy Council. The State party, however, also addresses the merits of the communication in order to expedite its examination.

4.2 The State party notes that the author's allegations are vague and that this makes it difficult for the State party to respond. It assumes that the claims under article 14 (3) (d) (e) and (5) relate to the circumstances of the filing of the author's appeal and denies that any violation occurred. According to the State party, the Court of Appeal sends out notices to persons wishing to appeal, to inform them of their attorney and the date of the appeal. The State party promises to inform the Committee of the dates of the notices sent to the author. However, no further information has been received.

5.1 In his comments, the author reiterates that he has never received a copy of the trial transcript, although the Jamaica Council for Human Rights received it some years ago.

5.2 He contests the State party's argument that he has not exhausted all available domestic remedies, since he is not in a position to file an application to the Judicial Committee of the Privy Council.

5.3 With regard to his claims, he states that there is no proof that he was represented on appeal, and that since he himself was absent witnesses could not be examined. The author encloses copies of all correspondence received from the Court of Appeal. From the correspondence, it appears that the author's application for leave to appeal as well as for permission to be present at the hearing of the appeal was filed on 23 November 1987, on grounds of unfair trial, insufficient evidence and improper directions. No application was made to have witnesses heard at the hearing of the appeal, according to the author unjustly so. The application was rejected by a single judge of the Court of Appeal on 14 November 1988, for reasons that the trial judge dealt fairly and adequately with the issue of identification and that the jury had evidence which if they accepted it could result in a verdict of guilty. It further appears that the full Court of Appeal confirmed the single judge's decision, on 28 November 1988.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's argument that the communication is inadmissible for non-exhaustion of domestic remedies. The Committee observes, however, that no legal aid was available to the author to petition the Judicial Committee of the Privy Council, and that in the circumstances no further remedies were available to him. The Committee considers therefore that no obstacles exist to the admissibility of the communication and, in order to expedite the examination of the communication, proceeds without further delay to a consideration of the merits of the communication.

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 With regard to the author's complaint that he had no opportunity to examine witnesses on appeal, the Committee notes from the documents of the Court of Appeal that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". The Committee considers therefore that the facts before it do not show a violation of article 14, paragraph 3 (e).

7.3 It further appears from the documents that leave to appeal was refused by a single judge whose decision was confirmed by the Court of Appeal. The judge refused leave of appeal only after a review of the evidence presented during the trial and after an evaluation of the judge's instructions to the jury. While on the basis of article 14, paragraph 5, every convicted person has the right to his conviction and sentence being reviewed by a higher tribunal according to law, a system not allowing for automatic right to appeal may still be in conformity with article 14, paragraph 5, as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case. Thus, in the circumstances, the Committee finds that no violation of article 14, paragraph 5 occurred in this respect.

7.4 With regard to the author's complaint that he was not present at the hearing of his application for leave to appeal and that he does not know who represented him on appeal, the Committee notes that the State party has submitted that in general the Court of Appeal sends notices to all appellants informing them of the date of the hearing and of the name of their representative. In the instant case, however, the State party has failed to provide any specific information as to whether and when the author was so informed. In the circumstances, it is unclear whether the author was at all represented on appeal, and the Committee therefore is of the opinion that the facts before it disclose a violation of article 14, paragraph 3 (d) _juncto_ paragraph 5.

7.5 With regard to the availability of the trial transcript, the Committee recalls that under article 14, paragraph 5 of the Covenant, the State party should provide the convicted person with access to the judgements and documents necessary to enjoy the effective exercise of the right to appeal.[55] In the present case, since the transcript was not made available to the author the Committee finds that the facts before it disclose a violation of article 14, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal violations of article 14, paragraphs 3 (d) and 5 of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Lumley with an effective remedy, including release. The State party is under an obligation to take measures to prevent similar violations in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[55] See, for example, the Committee's views on communications Nos. 230/1987 (Raphael Henry v. Jamaica) and 283/1988 (Aston Little v. Jamaica), both adopted on 1 November 1991.

APPENDIX

Individual opinion by Nisuke Ando and Maxwell Yalden
(partly dissenting)

We agree with all the findings of the Committee in this case except one: the issue of availability of the trial transcript to the author.

The author learned that an appeal on his behalf had been refused on 28 November 1988, although he was not aware of who had represented him on appeal. (See 2.4.) However, the Committee notes that in the author's application for leave to appeal the question "Do you desire to apply for leave to call any witnesses on your appeal?" has been expressly answered by "No". (7.2) In addition, the Committee has looked into the appeal proceedings and finds that no violation of article 14, paragraph 5, occurred. (7.3) However, since the trial transcript, which was necessary for the exercise of the author's right to appeal further to the Privy Council, was not made available directly to him, the Committee finds a violation of article 14, paragraph 5. (7.5)

Notwithstanding this finding of the Committee, we conclude that the counsel who represented the author at the appeal was very likely to be in possession of the trial transcript because, without it, he could not have pursued the appeal proceedings. Moreover, between 30 April 1988 and 29 June 1992, the author also exchanged several communications with the Jamaican Council for Human Rights, which was in possession of the trial transcript (2.5, footnote 1), but he apparently heard nothing from the Council on this matter.

It is regrettable that the State party has failed to provide the Committee with any specific information as to whether and when the author was informed by the Court of Appeal about the date of the hearing and the name of his representative (counsel). (7.4) Nevertheless, it is evident that the appeal counsel as well as the Jamaican Council for Human Rights was provided with the trial transcript and that either or both of them could have made it available to the author. In our opinion, the Committee should take this probability into account before categorically holding the State party responsible for a failure to make available to the author a copy of the trial transcript.

(Signed) Nisuke Ando

(Signed) Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

R. Communication No. 663/1995, Morrison v. Jamaica (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	McCordie Morrison (represented by Macfarlanes, a law firm in London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	25 November 1994 (initial submission)
Date of decision on admissibility:	3 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No. 663/1995 submitted to the Human Rights Committee by Mr. McCordie Morrison, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is McCordie Morrison, a Jamaican citizen, at the time of the submission of the communication awaiting execution at St. Catherine District Prison, Jamaica. The author claims to be the victim of a violation by Jamaica of articles 6, paragraph 2; 7; 9, paragraphs 2 and 3; 10, paragraphs 1 and 2; and 14, paragraphs 1, and 3 (b) and (c) and 5, of the International Covenant on Civil and Political Rights. He is represented by Macfarlanes, a law firm in London. The author's death sentence was commuted to life imprisonment, on 16 May 1995.

Facts as presented by the author

2.1 The author was arrested on 29 April 1984 and charged on 7 May 1984 with having murdered one Rudolph Foster on 6 March 1984. On 6 March 1985, the author and his co-accused, Tony Jones,[56] were convicted of murder and sentenced to death by the St. Elizabeth Circuit Court, Jamaica. The Court of Appeal of Jamaica refused the author's application for leave to appeal on 6 July 1987. His application for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 23 July 1991. With this, it is submitted, all available domestic remedies have been exhausted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.2 The prosecution's case was mainly based on the testimony of one Canute Thompson, who gave evidence that in the late evening of 6 March 1984 he had seen three men attack the deceased. He testified that he heard one of the attackers say to the deceased "Stand up, or else a kill you blood clat", and that he had seen one of them firing at Mr. Foster, who was running towards the witness. Furthermore, the witness testified that a bright street light had permitted him to recognize the author from a distance of one chain and three quarters. Mr. Thompson indicated that he had known the author for roughly 16 or 17 years, but that he had last seen him a year before. The only other evidence against the author was a comment he made upon his arrest: "how come ah me alone you arrest?". The prosecution based the case against the author on "common design".

2.3 Other prosecution evidence included that of a forensic expert who described the injuries he witnessed on the deceased and the removal of the plastic and fibre wadding from the wound in the back. A ballistics expert gave evidence that the fatal shot had been fired from a range of within 4 yards of the deceased's back.

2.4 On trial, the defence challenged the credibility of the testimony of Mr. Thompson, on the ground that he had held a grudge against the author's co-accused, Tony Jones. The reason for the hostility had been a dispute over a political issue which had resulted in Thompson, Jones and the author having a fight. The author claimed that the consequence of the fight had been that Thompson had informed the foreman at the work site where they all worked, and that he and Jones had subsequently been dismissed from their employment. Counsel further indicates that the author made an unsworn statement from the dock, denying any knowledge of the crime.

The complaint

3.1 The author alleges a violation of article 9, paragraphs 2 and 3, of the Covenant, on the ground that he was arrested on 29 April 1984 without having been informed of the reasons for his arrest, and that it was only between 30 January and 13 February 1985, during the preliminary examination, that he became aware that he was charged with murder. It is submitted that, even if he was cautioned on 7 May 1984, as stated by a police officer at trial, that was still more than a week after having been taken in custody. Counsel adds that the author spent more than 10 months in police custody before his trial.

3.2 As the author is indigent, the trial judge assigned a legal aid lawyer to him. According to the author, he received inadequate legal representation. In this respect, he claims that prior to the start of his trial, he had only one brief interview of 10 minutes with his attorney, approximately 7 weeks after his arrest; no written statement was taken from the author. It is unclear if any subsequent meetings took place, but the author maintains that he did not have enough time to discuss the case with his lawyer. Counsel notes that the legal aid lawyer was not present during the preliminary hearing and that the author was represented by his co-accused's lawyer. Counsel submits that the author did not have adequate time to prepare his defence and to communicate with counsel of his own choosing, in violation of article 14, paragraph 3 (b), of the Covenant.

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[56] Tony Jones also submitted his case to the Committee; it was registered as communication No. 585/1994. The Committee adopted its Views on the communication on 6 April 1998.

3.3 The author further claims a violation of article 10, paragraphs 1 and 2, of the Covenant, on the grounds that after his arrest he was not permitted to speak to any member of his family for three weeks and that he was badly beaten by police officers in police custody. It is also claimed that during his detention in police custody between 29 April 1984 and the date of the trial, the author was not segregated from convicted prisoners, nor was he subject to separate treatment, as would have been appropriate, given his status as an unconvicted person.

3.4 Counsel claims that the author has been a victim of a violation of article 14, paragraph 1. In this respect, it is submitted that the trial judge violated his obligation of impartiality by the method in which he dealt with the evidence of a possible grudge held by the prosecution's main witness. He alleges that the judge misdirected the jury in that he told them that it had not been suggested to Mr. Thompson in cross-examination that he bore malice towards the author. Counsel also submits that the judge failed to direct the jury properly on the dangers of convicting on identification evidence alone, especially in the case of weaknesses in the quality of the opportunity of observing the assailant and in the absence of corroboration or other support for the identification. Counsel indicates that the identification occurred at night under insufficient lighting conditions, that Mr. Thompson had only a limited opportunity to obtain a view of the assailant and that the author was not placed on an identification parade.

3.5 Counsel further submits that the trial judge should have discharged the jury, which had initially been empanelled, since during the course of the trial, one juror was seen talking to a member of the deceased's family. Counsel adds that the trial judge questioned this juror in the presence of the entire jury; the juror denied that a conversation had taken place.

3.6 The author was convicted on 6 March 1985; his appeal was heard and dismissed on 6 July 1987. Counsel submits that he has had problems securing a copy of the trial transcript in the author's case, and moreover, that the written judgement of the Court of Appeal was not received until 11 July 1990. It is submitted that the delay of 28 months between trial and appeal of conviction and the delay in receiving the Court of Appeal's judgement and the trial transcript amount to a violation of article 14, paragraphs 3 (c) and 5, of the Covenant. Moreover, it is submitted that the author's representative on appeal did not advance any argument on his behalf.

3.7 The author claims to be a victim of a violation of article 7 of the Covenant, since he was detained on death row for over 9 1/2 years. Counsel argues that the length of the detention, in which the author lived under appalling conditions in the death row section of St. Catherine District Prison,[57] amounts to cruel, inhuman and degrading treatment within the meaning of article 7. In support of his argument, counsel refers to a recent judgement of the Judicial Committee of the

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[57] Reference is made to a document entitled "Prison Conditions in Jamaica", May 1990, Human Rights Watch (U.S.A.).

Privy Council,[58] to a Zimbabwe Supreme Court judgement[59] as well as to a judgement of the European Court of Human Rights.[60]

3.8 Moreover, it is submitted that the author was ill-treated while in prison. Thus, on 4 May 1993, police officers and warders searched the prison, destroying much of the prisoners legal documents and physically assaulting some of them. As a result, the author and several other prisoners began a hunger strike which lasted three days, until a representative of the Jamaica Council for Human Rights was allowed to visit them. The author further claims that in 1992 he and other prisoners had found large numbers of their letters dumped in an old abandoned cell. In contrast to these allegations that have not been specified, as to which extent they relate to the author personally, counsel adds that the author has developed synovitis, which causes swelling of the joints, whilst in prison; although he so informed the Ombudsman on 10 November 1993, "no treatment" has been administered. Counsel concludes that since domestic remedies, and in particular the internal prison redress process and the complaints procedure of the Office of the Parliamentary Ombudsman, are neither available, nor effective, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met.

3.9 Counsel submits that article 6, paragraph 2, of the Covenant, has been violated because a sentence of death was passed without the requirements of a fair trial having been met.

3.10 Finally counsel contends that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Reference is made to the judicial precedents of the Judicial Committee of the Privy Council,[61] and to the Human Rights Committee's jurisprudence.[62] Counsel submits that all available domestic remedies have been exhausted.

State party's submission and counsel's comments

4.1 In its observations, dated 15 January 1996, the State party rejects the author's claim that the length of time he spent on death row constitutes cruel and inhuman treatment.

4.2 With regard to the author's allegation that he was not allowed to speak to his family for three weeks after having been arrested, the State party notes that there is no evidence to support this allegation and denies that this occurred. With regard to his complaint that he was not kept segregated from convicted prisoners during his pre-trial detention, the State party submits that the author has failed to submit detailed information in this respect, such as his place of detention. It states that in general convicted prisoners are not held in exactly the same circumstances as not convicted persons.

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[58] Judgement in Pratt and Morgan v. The Attorney General of Jamaica et al. (1993) (Privy Council) Appeal No. 4 of 1993, judgement delivered on 2 November 1993.

[59] Judgement No. S.C.73/93 delivered on 24 June 1993 in the case of Catholic Commission for Justice and Peace in Zimbabwe v. The Attorney General for Zimbabwe and the Sheriff for Zimbabwe and the Director of Prisons (1993).

[60] Judgement in the case of Soering v. United Kingdom (1989) 11 EHRR 439.

[61] DPP v. Nasralla and Riley et al. v. Attorney General of Jamaica.

[62] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991; communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

4.3 The State party has noted the author's complaint about lack of medical attention for his synovitis and promises to investigate and inform the Committee accordingly.

4.4 As to the author's complaint that he was represented by his co-accused's counsel, not by his own, the State party submits that this is no breach of the Covenant since prejudice does not necessarily arise.

4.5 With regard to the author's claims under article 14, paragraphs 3 (c) and 5, the State party notes that the author's appeal was dismissed two years and four months after his conviction, and that the written judgement by the Court of Appeal was issued eighteen months later, on 23 March 1989. The State party is not aware of any delay in producing the trial transcript. According to the State party, since the author had his conviction and sentence reviewed by the Court of Appeal there has been no breach of article 14, paragraph 5. The State party is also of the opinion that the period between the conviction and appeal does not constitute undue delay. It accepts that the delay in producing the written judgement was excessive, but does not accept that it constitutes a breach of the Covenant, since it did not prejudice the author.

4.6 With regard to the author's complaint about the judge's directions to the jury, the State party refers to the Committee's jurisprudence that it will not review the judge's instructions unless it is clear that they were manifestly arbitrary or amounted to a denial of justice. According to the State party, none of these exceptions apply in the present case, and the matter thus falls outside the Committee's jurisdiction.

5.1 In his comments on the State party's submission, counsel opposes the State party's assessment that prolonged judicial proceedings do not constitute cruel and inhuman treatment. He refers to alleged abuses which the author suffered and submits that these are to be taken into account when deciding the matter.

5.2 With regard to the allegation that the author was not allowed to speak to family members, counsel submits that evidence can be provided. He further states that the author was kept in Santa Cruz police station prior to his conviction. Counsel argues that it is not enough for the State party to simply deny the allegations without having undertaken any inquiries.

5.3 Counsel acknowledges that the author's representation by his co-accused's counsel at the preliminary hearing does not in itself constitute a breach of the Covenant, but submits that the author had not been fully interviewed by his co-accused's counsel and had no time to brief him properly. It is further stated that in preparation for the trial, the author was given his own counsel but that he did not have an opportunity to brief him adequately.

5.4 Counsel reiterates that the delay in issuing the written judgement of the Court of Appeal constitutes excessive delay in violation of article 14, paragraphs 3 (c) and 5.

5.5 With regard to his claim under article 14, paragraph 1, of the Covenant, counsel refers to the Committee's jurisprudence that a fair hearing necessarily entails that justice be rendered without undue delay.[63] Counsel further argues that the judge's instructions were clearly arbitrary and amounted to a denial of justice.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the author's claim that he was not allowed to see his relatives during the first three weeks of his detention, the Committee notes that the author has not shown what steps, if any, he has taken to bring these matters to the attention of the Jamaican authorities. In this respect, the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met and this part of the communication is therefore inadmissible.

6.3 With regard to the author's claim that there was not sufficient time to prepare his defence, since his lawyer came to see him only once before the trial, the Committee notes that it would have been for the author's representative or the author himself to request an adjournment at the beginning of the trial, if he felt that he did not have enough time to prepare the defence. It appears from the trial transcript that no adjournment was sought during the trial. The Committee considers therefore that this claim is inadmissible under article 2 of the Optional Protocol.

6.4 With regard to the author's claim pertaining to the conduct of the trial and the judge's instructions to the jury, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate courts of States parties, to evaluate the facts and the evidence in any given case. Similarly, it is not for the Committee to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were manifestly arbitrary or amounted to a denial of justice. The material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.5 The Committee is further of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that he was denied a fair hearing because the judge failed to discharge the jury after one juror was seen talking with a member of the family of the deceased. The Committee notes that the judge did in fact examine this matter, and that the trial transcript does not contain any information which corroborates the author's claim. This claim is therefore inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the author's claim under article 7 of the Covenant, on account of prolonged detention on death row, the Committee reaffirms its jurisprudence according to which detention on death row for prolonged periods of time does not constitute a violation of article 7 in the absence of some further compelling circumstances. The author has not substantiated any further specific circumstances, over and above the length of confinement on death row, and the claim is therefore inadmissible under article 2 of the Optional Protocol.

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[63] Communication No. 203/1986 (Muñoz Hermoza v. Peru), Views adopted on 4 November 1988, para. 11.3.

6.7 With regard to the author's claim that he found correspondence of prisoners in an abandoned cell, the Committee notes that the author has not specifically claimed that he found letters or documents written by or addressed to himself. This part of the communication is thus inadmissible under article 2 of the Optional Protocol, since the author has failed to forward a claim.

7. The Committee considers the author's remaining claims admissible. It notes that both the State party and the author have commented on the merits of the claims. The Committee therefore proceeds without further delay to an examination of the merits of the admissible claims.

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 The author has claimed that he was not informed of the reasons for his arrest, and that he only learnt about the charge against him when he first appeared before the judge at the preliminary hearing. From the trial transcript it appears that the police testified that he was cautioned on 7 May 1984, nine days after having been taken into custody. The State party has not addressed the author's claim. It is also undisputed that the author was not brought before a judge or judicial officer until some date after 7 May 1984. The Committee considers that a delay of nine days before informing a person who is arrested of the charges against him constitutes a violation of article 9, paragraph 2. The Committee further considers that the delay in bringing the author before a judge or judicial officer constitutes a violation of the requirement of article 9, paragraph 3.

8.3 As to the author's claims that he was beaten by the police and that he was not kept segregated from convicted prisoners during his pre-trial detention between 29 April 1984 and the trial, the Committee notes that the State party has not denied the allegation but has pointed to the author's duty to provide specific details, including the place of detention. Although such information was provided in counsel's submission of 21 February 1996, communicated to the State party on 19 March 1996, no additional comments have been received from the State party. In the circumstances, due weight must be given to the author's allegations. The Committee finds that the beatings constituted a violation of the author's rights under article 7 and that the lack of segregation from convicted prisoners violated article 10, paragraph 2 (a).

8.4 With regard to the author's claim that he did not have sufficient time to brief his co-accused's lawyer during the preliminary hearing, the Committee notes that the defence is not presented at the preliminary hearing. Consequently, the Committee finds that the facts before it do not constitute a violation of article 14, paragraph 3 (b) and (d).

8.5 The Committee notes that the author's appeal was heard on 6 July 1987, two years and four months after his conviction, that, according to the State party, the written judgement was issued on 23 March 1989, and that the author did not receive a copy until 11 July 1990, almost three years after the hearing of the appeal. The Committee refers to its prior jurisprudence[64] and reaffirms that under article 14, paragraph 5, a convicted person is entitled to have, within reasonable time, access to written judgements, duly reasoned, for all instances of appeal in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law and without undue delay. The Committee is of the opinion that the delay in hearing the appeal and in issuing a written judgement by the Court of Appeal and in providing the author with a copy, constitutes a violation of article 14, paragraphs 3 (c) and 5.

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[64] See, for example, the Committee's Views on communications Nos. 230/1987 (Raphael Henry v. Jamaica), and 283/1988 (Aston Little v. Jamaica), both adopted on 1 November 1991.

8.6 With regard to the author's claim that he was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence that under article 14, paragraph 3 (d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, the author should have been informed that legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him.[65] The Committee concludes that there has been a violation of article 14, paragraph 3 (d).

8.7 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In Mr. Morrison's case, the final sentence of death was passed without having met the requirements of a fair trial as set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6, paragraph 2, has also been violated.

8.8 The author has claimed a violation of article 10 of the Covenant, because he has not received any medical treatment for his synovitis. The State party has promised to investigate the claim about the lack of medical treatment. The Committee recalls that a State party is under an obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol procedure.[66] This entails forwarding the outcome of the investigations to the Committee, in detail and without undue delay. The Committee finds that in spite of its promise of 19 January 1996 to investigate the claim of lack of medical treatment, the State party has failed to provide any additional information. Consequently, due weight must be given to the author's allegation that he was denied medical treatment, and the Committee finds that the lack of medical treatment to the author constitutes a violation of article 10 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraphs 2 and 3, 10, paragraphs 1 and 2 (a), 14, paragraphs 3 (c) (d) and 5, and consequently article 6, paragraph 2, of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. McCordie Morrison with an effective remedy, including

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[65] See, inter alia, the Committee's Views on communications Nos. 461/1991 (Graham and Morrison v. Jamaica), adopted on 25 March 1996, para. 10.5, and 537/1993 (Paul Anthony Kelly v. Jamaica), adopted on 17 July 1996, para. 9.5.

[66] See, inter alia, the Committee's Views in case No. 161/1983 (Herrera Rubio v. Colombia), adopted on 2 November 1987.

release and compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

11. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 665/1995, Brown and Parish v. Jamaica (Views adopted on 29 July 1999, sixty-sixth session)*

Submitted by:	Owen Brown and Burchell Parish (represented by Ms. Natalia Schiffrin of Interights in London)
Alleged victim:	The authors
State party:	Jamaica
Date of communication:	27 February 1995
Date of decision on admissibility:	23 October 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 July 1999,

Having concluded its consideration of communication No. 665/1995 submitted to the Human Rights Committee by Messrs. Owen Brown and Burchell Parish under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Owen Brown and Burchell Parish, Jamaican citizens, at the time of submission awaiting execution at St. Catherine District Prison, Jamaica. They both claim to be victims of violations by Jamaica of article 14, paragraphs 1, (3) (b), 3(c) and 3(d), and, consequently, article 6, paragraph 2, of the Covenant. They are represented by Ms. Natalia Schiffrin of Interights in London. On 16 May 1995, their sentences were commuted to life imprisonment.

The facts as submitted by the authors

2.1 On 1 May 1985, the authors were convicted for the murder of Angela Simmonds on 1 October 1982, and sentenced to death. On 25 September 1987, the Court of Appeal dismissed their appeal, which had been based on lack of evidence to sustain a conviction and improper instructions by the judge to the jury. However, one of the judges, JA Rowe, had grave doubts as to the decision. He subsequently set out his observations in a letter dated 17 July 1989 sent to the authors' counsel who was preparing a petition for special leave to appeal to the Privy Council. Special leave to appeal to the Privy Council was refused in an oral judgment handed down by the Privy Council on 16 December 1991.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. Pursuant to rule 85 of the Committee's rules of procedure, Mr. Rajsoomer Lallah did not participate in the examination of the case.

2.2 At trial, the case for the prosecution, which relied upon the evidence of six witnesses, was that the two accused were among three or four men who came to Regent Street in Kingston where the deceased lived, each of them allegedly armed with a gun, and that seven shots were fired down the centre of the street from west to east, fatally wounding Angela Simmonds and also wounding her brother Hamilton Simmonds.

2.3 Owen Brown gave sworn evidence to present an alibi. He said he was at home with his "babymother" that night. He denied the allegations made as to his complicity in the crime, and stated that he had turned himself in, on 4 October 1982, only after he had learned that the police was looking for him. Burchell Parish made an unsworn statement. He also set up an alibi, saying he had spent that night at his girlfriend's house. No witnesses were called to testify on the authors' behalf.

The complaint

3.1 The authors claim that their right to adequate and effective legal assistance was denied, in violation of article 14, paragraph 3 (b) and 3 (d). Owen Brown recalls that he only saw his (legal aid) lawyers for 5 or 10 minutes when he attended court for the trial date to be set. Subsequently he saw them for a further half hour and felt that the meeting was of very poor quality. He further states that he did not see his appeal lawyer till after his appeal hearing because he did not realise who was to represent him until his appeal was about to be heard. Similarly, Burchell Parish states that he did not see his lawyer at the appeal stage and only "heard" who he was represented by. He also complains that he has not seen or heard from his trial attorney since the day he was sentenced to death.[67]

3.2 The authors further claim that they were not tried without undue delay. They were arrested on or about 4 October 1982. The trial was not held until May 1985, a pre-trial delay of some two years and seven months. The decision of the Court of Appeal was not given until September 1987, i. e. after an additional delay of some two years and four months.[68] It is argued that this amounts to a violation of article 14, paragraph 3 (c).

3.3 The authors further claim that the trial process as a whole was not conducted in a fair and impartial manner, in violation of article 14, paragraph (1). They argue that the trial judge refused to provide the jury with an alternate instruction of manslaughter, though the evidence could clearly support such a verdict. Given the evidence that the bullet ricocheted more than once before injuring the victim, the absence of a post-mortem examination or medical evidence to assist the jury in determining exactly the cause of death, the lack of witnesses who could testify with any certainty as to the exact direction from which the shots were fired, the possibility that the shots were merely fired with the intent of scaring people and not of harming anyone, the fact that no one else was injured despite the number of people present and the number of shots fired, and the lack of evidence suggesting a motive for murder, it is submitted that the judge erred in failing to include a direction of manslaughter. In light of the fact that such a charge could have resulted in a sentence other than the death penalty, it is submitted that such a failure amounted to an arbitrary denial of justice.

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[67] Reference is made to communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991, para. 8.3; communication No. 232/1987 (Daniel Pinto v. Trinidad and Tobago), Views adopted on 20 July 1990, para. 12.5; and communication No. 272/1988 (Thomas v. Jamaica), Views adopted on 31 March 1992.

[68] Reference is made to communication No. 253/1988 (Paul Kelly v. Jamaica), Views adopted on 8 April 1992.

3.4 The authors further alleged a violation of article 6, paragraph 2, because their sentence of death was imposed upon the conclusion of a trial in which the provisions of the Covenant have not been respected.

3.5 It is submitted that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

3.6 The authors contend that they have exhausted every possible domestic course of action which potentially might constitute a remedy. As regards the constitutional remedies which would be available to the authors under the Jamaican Constitution, it is submitted that in the absence of legal aid for filing a motion in the Jamaican Constitutional Court, recourse to the Jamaican Constitutional Court under section 25 of the Jamaican Constitution would not be a remedy available to the authors within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

State party's observations and counsel's comments thereon

4.1 In its submission of 12 January 1996, the State party addresses the admissibility of the communication without explicitly contesting it. Instead, the State party denies that there is any merit in the authors' claims.

4.2 As to the alleged violation of article 14, paragraph 3 (b) and 3 (d), on the ground of lack of time with counsel to prepare an adequate defence, the State party submits that its duty is to provide persons with competent counsel to represent them, as was done here, and that it cannot be held responsible for the manner in which legal aid counsel conducts the case.

4.3 With regard to the alleged violation of article 14, paragraph 3 (c), the State party notes that a preliminary hearing was held during the period of two years and seven months which lapsed from the authors' arrest until their trial, and it submits that neither this period nor the period of two years and four months which lapsed from their conviction to the date the appeal was decided can be considered as undue delay.

4.4 With respect to the alleged violation of the right to a fair trial, as provided for in article 14 of the Covenant, the State party submits that the trial judge's directions to the jury on the issues of identification and reasonable doubt, are matters which fall outside the Committee's jurisdiction. It is submitted that the exceptions to this principle, i.e. that the instructions were arbitrary or amounted to a denial of justice or that the judge otherwise violated his obligation of impartiality, are not applicable in this case.

5.1 In her submission of 22 February 1996, counsel did not agree to a combined examination of admissibility and merits. Counsel submits that the State party's assertion that it is not responsible for the manner in which legal aid counsel conducts the case is wrong in law. It is argued that while it is well settled that the Committee will not second-guess the professional judgement of assigned counsel, the Committee has made it clear that the State can and will be held liable for the ineffective conduct of counsel. Reference is made to the jurisprudence[69] of the Committee.

5.2 As to the claim of undue delay in breach of article 14, paragraph 3 (c), counsel points out that the authors were arrested three days after the murder took place, and, as such, that the State party was at the outset in possession of evidence of the alleged guilt of the applicants sufficient to warrant their arrest and detention. Counsel therefore asserts that without further explanation, the fact that a preliminary inquiry took place does not satisfactorily explain why a period of two years and seven months was required before trial. In this regard, counsel notes that the State party has not suggested that any specific problems arose during the preliminary inquiry that would warrant this delay. In conclusion, counsel submits, in light of the fact that all accused are to be to be considered innocent until proven guilty, that the delay of two years and seven months was excessive. Moreover, counsel notes that the aggregate of the periods of delay, from their conviction and sentencing in 1985 until the commutation of their sentences in 1995, resulted in 10 years on death row. Counsel submits that this delay is "undue" within the meaning of the Covenant.

5.3 As to the alleged violation of article 14, paragraph 1, counsel reiterates that the judge's refusal to leave the jury with the possibility of a manslaughter verdict amounts to a denial of justice which constitutes a violation of the Covenant.

Consideration of admissibility

6.1 During its 64th session, the Committee considered the admissibility of the communication.

6.2 With regard to the authors' allegation of a violation of article 14 on the ground of lack of instructions from the trial judge to the jury on the issues of manslaughter, the Committee reiterated that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated the obligation of impartiality. However, the trial transcripts made available to the Committee did not reveal that the authors' trial suffered from any such defects. Accordingly, this part of the communication was inadmissible as the authors had failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.3 The Human Rights Committee therefore decided that the communication was admissible in so far as it may raise issues under article 14, paragraphs 3 (b),

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[69] Communication No. 353/1988 (Lloyd Grant v. Jamaica), Views adopted on 31 March 1994; communication No. 596/1994 (Dennie Chaplin v. Jamaica), Views adopted on 2 November 1995; communication No. 253/1987 (Paul Kelly v. Jamaica), Views adopted on 8 April 1991; communication No. 338/1988 (Leroy Simmonds v. Jamaica), Views adopted on 23 October 1992; communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

3 (c) and 3 (d), and consequently article 6, paragraph 2, and article 9, paragraph 3, of the Covenant.

Subsequent submissions from the parties

7. In its Note of 14 April 1999, the State Party notifies the Committee that it has nothing to add to its previous submissions.

8. In her letter of 6 May 1999, counsel likewise states that she has no further comments to forward on behalf of the authors.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information which has been made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 With regard to the authors' claim that in violation of article 14, paragraphs 3 (b) and 3 (d), they were denied adequate and effective legal representation in relation to the trial, the Committee recalls that sufficient time must be granted to the accused and their counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defense lawyers unless it has denied the authors and their counsel time to prepare the defense or it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. The Committee notes that the authors' legal aid counsel were assigned in due time for the trial. Furthermore, neither counsel nor the authors actively requested an adjournment, and there is nothing else in the trial transcript which can suggest that the State party denied the authors and their counsel opportunities to prepare for the trial or that it should have been manifest to the court that the defence team was inadequately prepared. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on this ground. Consequently, there has been no violation of article 6, paragraph 2, either.

9.3 Similarly, with regard to the alleged violation of the same provisions on the ground that the authors did not meet with their new counsel before the hearing of the appeal, the Committee notes that the new counsel in fact argued grounds of appeal on the authors' behalf before the Court of Appeal and that there is nothing in the file which suggests that the State party denied the authors and their counsel time to prepare the appeal or that it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. The Committee concludes, therefore, that there has been no violation of article 14, paragraphs 3 (b) and 3 (d), and, consequently, article 6, paragraph 2, on this ground either.

9.4 The authors have claimed to be victims of a violation of article 14, paragraph 3 (c), both in regard of the trial and the appeal, as the trial was not held until 31 months after the arrest of the authors and the appeal was not decided until 28 months after the trial. With regard to the first period, the Committee found that it should be examined on the merits also under article 9, paragraph 3.

9.5 The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, and notes that the State party has merely argued that a preliminary hearing was held during the period which lapsed before the trial commenced and that neither this period nor the period before the appeal amounts to violations of the said provisions, without offering any further explanation. In the absence of any circumstances justifying these delays, the Committee finds that there has been a violation of articles 9, paragraph 3, and 14, paragraph 3 (c), with regard to the first period, and article 14, paragraph 3 (c), in conjunction with article 14, paragraph 5, with regard to the second period.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraph 3, article 14, paragraph 3 (c), and article 14, paragraph 3 (c), in conjunction with article 14, paragraph 5.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide both Mr. Brown and Mr. Parish with an effective remedy, including compensation.

12. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12 (2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

T. Communication No. 668/1995, Smith and Stewart v. Jamaica (Views adopted on 8 April 1999, sixty-fifth session)*

Submitted by:	Errol Smith and Oval Stewart (represented by Ms. Natalia Schiffrin of Interights)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	18 July 1995
Prior decision:	Special Rapporteur's rule 91 decision, transmitted to the State party on 15 November 1995
Date of decision on admissibility:	8 April 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1999,

Having concluded its consideration of communication No. 668/1995 submitted to the Human Rights Committee by Messrs. Errol Smith and Oval Stewart under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Errol Smith and Oval Stewart, two Jamaican citizens currently detained at South Rehabilitation Centre, Kingston, Jamaica. They claim to be victims of violations by Jamaica of article 14, paragraphs 1, 3 (c), 3 (d), 3 (e) and 5, of the International Covenant on Civil and Political Rights. In addition, Oval Stewart claims to be a victim of violations of articles 7 and 10, paragraph 1. They are represented by Natalia Schiffrin of Interights.

The facts as submitted by the authors

2.1 The authors were convicted for murder and sentenced to death on 8 November 1982 by the Home Circuit Court of Jamaica. The authors' appeals were dismissed by the Jamaican Court of Criminal Appeal on 14 December 1984. On 17 July 1986, the

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Judicial Committee of the Privy Council dismissed their appeals. The authors have not sought a constitutional motion to the Jamaican Supreme Court because they were denied legal aid for such motions. On 15 February 1991, Oval Stewart's death sentence was commuted to life imprisonment. Following the enactment of Offences Against the Person (Amendment) Act 1992, Errol Smith's death sentence was also commuted.

2.2 The case for the prosecution was that on 30 June 1980 in the evening, two men, Owen Bailey and Rohan Francis, were moving a bed. A group of men were present nearby, including the two authors, and started to fire shots at Bailey and Francis, who immediately fled. Owen Bailey ran back into his house, where his father was, and where he was shot shortly after, while Francis hid at the back of the house. It is stated that Rohan Francis made a statement to the police on the night of the murder, but that the statement was subsequently lost and a second statement was only taken three months later. In this statement, Francis allegedly gave about six names, including those of Smith and Stewart.

2.3 At the trial, Rohan Francis identified the authors as members of the group which had approached him on the day of Owen Bailey's murder. Rohan Francis testified that Errol Smith had a gun and that he had heard him say that Owen Bailey had to be killed. Mr. Herman Bailey, the deceased's father, testified that he could not see the man with the gun who shot his son because he was standing behind a door, and could therefore not identify the authors.

The complaint

3.1 The authors claim that they are victims of a violation of article 14, paragraphs 1 and 3(e), of the Covenant on two grounds. Firstly, the authors state that the testimony of the prosecution's main witness, Rohan Francis, was inaudible and incomprehensible, and thus imply that the conviction was wrongful.

3.2 Secondly, the authors state that the prosecution failed to produce the first statement given by the prosecution's main witness, thereby prejudicing the authors' ability to impeach his testimony. It is stated that Mr. Francis testified that in his first statement given on the night of Owen Bailey's death, he did not give the police the names of who killed Owen Bailey, and that he thereafter did not identify the authors until three months later. The authors argue that the first statement was essential, as it would have thrown serious doubts on Mr. Francis' trial identification of, inter alia, Mr. Smith as the man carrying the gun. Furthermore, counsel argues that without knowing what Mr. Francis said to the police when events were freshest in his memory, it is impossible to say what other opportunities for cross-examination the authors were deprived of.

3.3 The authors claim to be victims of a violation of article 14, paragraph 3(d), on the ground of inadequate legal assistance. It is submitted that the authors' legal aid lawyers failed to subject the prosecution's case to meaningful adversial testing as they failed both to call any witnesses and to move for a mistrial or otherwise object to the inaudibility of the prosecution's main witness, Rohan Francis. In this regard, Mr. Stewart also claims to be a victim of a violation of article 14, paragraph 3(b), as he was not afforded adequate opportunity to prepare his defence together with his legal aid lawyer. It is submitted that their first meeting was on the day of the preliminary hearing, and that the lawyer subsequently only visited him once before the trial.

[illegible]

co-defendant's lawyer to convey to the court that he had "considered the notes of evidence and the summing up in so far as it affected Smith, and that having done so he found nothing on which he could properly base an application for leave to appeal". Reference is made to the jurisprudence of the Committee.

3.5 The authors also claim that they are victims of a violation of article 14, paragraphs 3(c) and 5, on the ground that, although they appealed to the Court of Appeal immediately after their conviction and sentence in November 1982, the Court of Appeal did not deliver its judgement in the matter for two full years, until December 1984. It is submitted that this delay was entirely attributable to the State party.

3.6 Mr. Stewart claims that he was subjected to inhuman and degrading conditions on death row at St. Catherine's District Prison in violation of articles 7 and 10, paragraph 1, of the Covenant. It is submitted that the sanitary conditions are dreadful, that the nutritional quality and quantity of the food is grossly inadequate and that the author was denied access to non-legal correspondence. It is further stated that the author was subjected to inadequate medical care, causing him to lose the sight in one of his eyes. The author has not sought a remedy through the Ombudsman because he does not believe that such a complaint would have any effect.

State party's submission and counsel's comments thereon

4.1 In its submission of 15 January 1996, the State party, "in order to expedite the examination of the communication", offers its comments also on the merits.

4.2 With regard to the alleged violations of article 14 on the ground of the alleged inaudibility of the main prosecution's witness and on the ground that the prosecution misplaced the first police statement of this witness, the State party submits that these matters relate to facts and evidence and that they therefore fall outside the scope of issues to be dealt with by the Committee.

4.3 With regard to the alleged violation of article 14, paragraph 3(d), on the ground of inadequate legal assistance for both authors before the Home Circuit Court and for Mr. Smith also before the Court of Appeal, the State party notes that these complaints concern the manner in which the legal aid lawyers chose to conduct their case, and submits that this is not a matter for which the State party can be held responsible. It is argued that the State party's obligation under the Covenant is to appoint competent legal aid counsel, but that the manner in which they conduct their case thereafter cannot be attributed to the State party.

4.4 With regard to the alleged violation of article 14, paragraphs 3(c) and 5, on the ground of delay between the conviction of the authors and the dismissal of their appeal, the State party states that it does not regard the period of two years which lapsed as undue delay, and submits that there has been no breach of the Covenant.

4.5 As to Mr. Stewart's claim that article 10, paragraph 1, was breached because he was denied medical attention and thereby lost vision in one eye, the State party states that this allegation will be investigated, and that the results of the investigation will be sent to the Committee as soon as they are ready.

5.1 In her submission of 1 March 1996, counsel states that the authors agree to

5.2 With regard to the authors' claim of a violation of article 14, paragraphs 1 and 3 (e), because the prosecution's main witness was inaudible, counsel notes the State party's assertion that this relates to the facts of the criminal case and that the claim therefore should not be dealt with by the Committee. Counsel argues that these allegations in the present case go to the very basis of the right to a fair trial and should be properly considered by the Committee. Counsel notes that the State party does not dispute that a vast amount of the testimony of the witness could not be understood by the jury, and submits that the facts amount to a violation of the fair trial guarantees of article 14.

5.3 In relation to the missing statement from the main prosecution witness, counsel reiterates that the witness failed to name the authors as those responsible for the murder in the statement, even though it was given on the same night. It is submitted that, in the view of the influence this missing statement could have had on the court proceedings, the failure to produce it constitutes a violation of article 14, paragraph 3(e). Reference is made to the jurisprudence of the Committee.[70]

5.4 Counsel notes the State party's response to the alleged violations of article 14, paragraph 3(b) and (d), where it held that the manner in which legal aid counsel conduct their cases cannot be attributed to the State party. Counsel submits that this assertion is wrong in law and argues that while it is well settled that the Committee will not second-guess the professional judgement of assigned counsel, the Committee has made it clear that the State party can and will be held liable for the ineffective conduct of counsel. With regard to the present case, counsel submits that the complete lack of preparation and strategy and the total apathy on counsel's part in calling witnesses as well as in making objections creates a presumption of inequality of arms. Reference is made to the jurisprudence[71] of the Committee.

5.5 Specifically to Mr. Smith's claim under these provisions, counsel reiterates that his lawyer failed to argue his case before the Court of Appeal, and submits that this decision taken by counsel brings this case in line with a number of cases[72] where the Committee has held abandoned appeals to be violations of article 14, paragraph 3(d).

5.6 With regard to Mr. Stewart's claim under article 14, paragraph 3(b), that he only met with his lawyer once for a few minutes prior to the trial, counsel reiterates that this amounts to a violation of this provision. Reference is made to the jurisprudence of the Committee.[73]

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[70] Communications Nos. 464/1991 and 482/1991 (Garfield Peart and Andrew Peart v. Jamaica), Views adopted on 19 July 1995.

[71] Communication No. 338/1988 (Leroy Simmonds v. Jamaica), Views adopted on 23 October 1992; communication No. 353/1988 (Lloyd Grant v. Jamaica), Views adopted on 31 March 1994; communication No. 596/1994 (Dennie Chaplin v. Jamaica), Views adopted on 2 November 1995.

[72] Communication No. 250/1987 (Carlton Reid v. Jamaica), Views adopted on [illegible]
adopted on 31 March 1994; communication No. 356/1989 (Trevor Collins v.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the alleged violation of article 14 on the ground of deficiencies in the testimony of the main prosecution witness, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case, as in this case was done both by the trial court and the Court of Appeal. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 The Committee declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 In regard to the alleged violation of article 14, paragraph 3(b), it transpires that the witness Rohan Francis conceded in his evidence that in his original police statement he had not named the alleged murderers of Mr. Bailey and that he was examined by the judge on this point. In the summing up to the jury, the judge made mention of this point too. In these circumstances, the Committee cannot find that the failure to produce to the defence Francis' original police statement, which was apparently mislaid and was not part of the prosecution's case, constituted a violation of article 14, paragraph 3(b).

7.2 The authors claim to be victims of a violation of article 14, paragraph 3(d), on the ground that their legal assistance before the Home Circuit Court was inadequate. The author Stewart also alleges a violation of article 14, paragraph 3(b), as he was not afforded sufficient time with his legal aid lawyer to prepare for his trial. With regard to the quality of defence, it is submitted that the legal aid lawyers failed to challenge the prosecution's case in an appropriate manner as they failed both to call any witnesses and to move for a mistrial or

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[73] [illegible]

adopted on 1 November 1991; communication No. 355/11989 (George W. Reid otherwise object to the inaudibility of the prosecution's main witness. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time be granted to the accused and their counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. The Committee notes that neither of the authors nor their counsel requested an adjournment and finds that there is nothing in the file which suggests that it should have been manifest to the court that the lawyers' conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

7.3 Mr. Smith has also claimed to be a victim of article 14, paragraphs 3 (d) and 5, on the ground that his lawyer failed to argue his case before the Court of Appeal, and instead asked the co-defendant's lawyer to convey to the court that he had found nothing on which he could base an application for leave to appeal. On the basis of this message, the Court of Appeal refused Mr. Smith's application without further consideration. The State party does not dispute these facts, but contends that it is not responsible for counsel's conduct of the case. The Committee recalls its jurisprudence[74] that the right to representation under article 14, paragraph 3(d), entails that the court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel's professional judgment, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the court should ascertain whether counsel has informed the accused. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. In the present case, it does not appear that the Court of Appeal ascertained that the author was duly informed, and the Committee concludes that there has been a violation of article 14, paragraphs 3(d) and 5, on this ground.

7.4 The authors have claimed that the period of 25 months which lapsed from their conviction to the dismissal of their appeal in the Court of Appeal constitutes a violation of article 14, paragraphs 3(c) and 5. The Committee reiterates that all guarantees under article 14 of the Covenant should be strictly observed in any criminal procedure, particularly in capital cases, and notes that the State party has merely argued that such a period does not amount to a violation of the Covenant, without offering any explanation for the delay. In the absence of any circumstances justifying the delay, the Committee finds that there has been a violation of article 14, paragraph 3(c), in conjunction with paragraph 5.

7.5 As to Mr. Stewart's claim of a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that Mr. Stewart has made specific allegations. He states that the sanitary conditions of the prison are dreadful, that the quality and quantity of the food is grossly inadequate and that he has been denied access to non-legal mail. Furthermore, he states that he has been subjected to inadequate medical attention, which has caused the loss of his sight in one eye. The State party has not refuted these specific allegations, and has not, in spite of its explicit promise and the principle in article 4, paragraph 2, of the Optional Protocol, forwarded results of the investigation announced in 1996 into the author's allegations that he was denied medical attention. The Committee finds that these circumstances disclose a violation of articles 7 and 10, paragraph 1, of the Covenant.

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[74] See, inter alia, the Committee's Views on communications Nos. 537/1993 [illegible]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 14, paragraphs 3(c), 3(d) and 5, of the International Covenant on Civil and Political Rights in the case of Mr. Smith, and articles 7, 10, paragraph 1, and 14, paragraph 3(c), in conjunction with paragraph 5, of the International Covenant on Civil and Political Rights in the case of Mr. Stewart.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Smith and Mr. Stewart with effective remedies, including compensation for both of them and the release of Mr. Smith.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

U. Communication No. 680/1996, Gallimore v. Jamaica (Views adopted on 23 July 1999, sixty-sixth session)*

Submitted by:	Lancy Gallimore (represented by Mr. Anthony Poulton of Macfarlanes, a London law firm)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	29 April 1995
Prior decision:	Special Rapporteur's rule 91 decision, transmitted to the State party on 14 March 1996
Date of decision on admissibility:	23 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Having concluded its consideration of communication No.680/1996 submitted to the Human Rights Committee on behalf of Lancy Gallimore, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Lancy Gallimore, a Jamaican citizen imprisoned at the General Penitentiary in Kingston. He claims to be a victim of violations by Jamaica of articles 7, 10, paragraph 1, 14, paragraphs 1, 3 (b) and 5, of the International Covenant on Civil and Political Rights. He is represented by Mr. Anthony Poulton of Macfarlanes, a London law firm. The author's offence has been reclassified as non-capital.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia [illegible]

The facts as submitted by the author

2.1 The author was arrested on 8 May 1987 for the murder, of one Angela Bess, which took place on that day and was charged on 12 May 1987. On 18 November 1987, the author was found guilty as charged and sentenced to death by the Kingston Circuit Court. The Court of Appeal of Jamaica dismissed his appeal on 11 July 1988. A further application for special leave to appeal to the Judicial Committee of the Privy Council has not been filed, for reasons set out below.

2.2 Since his conviction on 18 November 1987 the author was held at St. Catherine's District Prison on death row. On 8 December 1992, the author's case was reviewed and classified by decision of a single judge of the Court of Appeal as non-capital murder pursuant to the Offences Against the Persons (Amendment) Act 1992. The author's sentence was therefore commuted to life imprisonment.

2.3 As to the issue of exhaustion of domestic remedies, counsel explains that Mr. Gallimore has not petitioned the Judicial Committee of the Privy Council for special leave to appeal against the judgment of the Court of Appeal, because the substance of his appeal does not come within the restrictive jurisdiction of the Privy Council, as it has established that it will not act as a Court of Criminal Appeal. Furthermore, London counsel reportedly advised that such a petition would have little prospect of success. Thus, it is submitted, in the author's case an appeal to the Judicial Committee of the Privy Council is neither an effective nor an available remedy.

2.4 In the same manner, the author did not apply to the Supreme (Constitutional) Court of Jamaica for redress, because it is considered that such a constitutional motion would inevitably fail in the light of the precedent set by the decisions of the Judicial Committee of the Privy Council in DPP v. Nasralla[75] and Riley v. Attorney General of Jamaica,[76] where it was held that the Jamaican Constitution was intended to prevent the enactment of unjust laws and not merely unjust treatment under the law. It is stated that since the author alleges unfair treatment under the law and not that post constitutional laws are unconstitutional, the constitutional remedy is not available to him. It is further submitted that, even if it is considered that the author does have a constitutional remedy in theory, in practice it is not available to him because of his lack of funds and the unavailability of legal aid. In this connection, reference is made to the Committee's jurisprudence in relation to the communications of Raphael Henry (communication No. 230/1987) and Lynden Champagnie, Delroy Palmer and Oswald Chisholm (communication No. 445/1991).

2.5 The case for the prosecution was that, on 8 May 1987, at 9.30 p.m., Angela Bess, after talking with the author in the street, was killed by one stab with an ice-pick by the author.

2.6 The prosecution's case was mainly based on the evidence of one Phillip Robinson. He testified that, sitting in the front of a minibus, he witnessed the author with his back turned towards the road talking with the deceased near the bus station, when suddenly the author pulled something out from the vicinity of his waist and made a hostile motion towards her. He saw the author move off quickly, he got out of the bus, the woman fell into his arms and told him, that the man had stabbed her. The witness put her down on the ground and got back onto the bus

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which was driving in the same direction as that in which the author was attempting to escape. The author got on the bus, and when he got off, the witness followed him, and, pretending to be a police officer, challenged the author to stop. He searched the author's pockets and found an ice-pick. Having removed this, the witness took the author to the police station.

2.7 The body of Angela Bess, bearing a stab wound in the region of the heart, was found by the police at the place of the incident later in the evening, and identified on 15 May 1987 by Aneita Taylor, the mother of the deceased.

2.8 The author's defence was based on mistaken identity. The author made a sworn statement alleging that he was in a bar having drinks, after which, while he was waiting for a bus, the witness and another man came towards him, called him George Campbell and forced him at gun point to follow them first to the place of the incident and then to the police station. He stated that the deceased was entirely unknown to him.

2.9 The appeal of the author was based on the grounds of unfair trial and insufficient evidence to warrant a conviction. The author himself was not present at the appeal and was represented by a different legal aid lawyer than the one who had represented him at the trial. The author's appeal lawyer did not argue any grounds of appeal on his behalf, and stated that he could not find any arguable grounds in favour of the author.

The complaint

3.1 The author claims that he is a victim of a violation of article 10, paragraph 1, of the Covenant. In this connection, counsel states that, between 8 and 9 May 1987 while the author was in custody, he was twice beaten by the police with cable brake wire all over his body and police officers stood on his stomach.[77] Counsel further states that the author has been badly beaten several times by prison warders with no cause when he was detained in St. Catherine District Prison on death row, and that as a result of one beating he was unable to use his right hand for 17 days. Counsel adds that, despite several complaints to the prison officers, the author has not been treated for the resulting injuries, nor has he been seen by a doctor.

3.2 It is further stated that the author wrote to the Parliamentary Ombudsman after he had been beaten up by police officers while in custody on 8 and 9 May 1987, but received no response.[78] Reference is made to the Amnesty International Report of December 1993 in which it is stated that the Office of the Ombudsman does not have sufficient funding to be effective, and it is stated that the last report of the Ombudsman was dated December 1988. It is therefore submitted that the Office of the Parliamentary Ombudsman does not provide an effective domestic remedy in the circumstances.

3.3 As to his claim under article 14 of the Covenant, counsel refers to passages of the judge's summing-up to the jury. It is submitted that the trial judge failed to properly direct the jury, according to the legal rules required in identification cases as they are laid down in the decision R. v. Turnbull.[79] In particular, it is said that the identification warning given to the jury by the judge was inadequate, and that the indication of the weakness in the evidence was unclear and unsatisfactory.

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[77] The matter was not raised during the trial.

[78] No copy of the author's letter is provided.

3.4 As to article 14, paragraph 3 (b), counsel states that the author did not have adequate time for the preparation of his defence and to communicate with counsel of his own choosing. In this connection, counsel points out that the legal aid lawyer in the first court hearing was assigned by the judge and was not chosen by the author. Counsel alleges that the author met with his attorney for the first time only four weeks after his arrest, that the interview lasted 10 minutes and no written statement was taken by the attorney. He points out that the author had only two subsequent meetings, after the Preliminary Hearing and immediately before the trial, which also lasted only ten minutes, and that this was not enough time to go through his case with his lawyer. No witnesses were called on the author's behalf.

3.5 Counsel further points out that, as regards his appeal, the author was assigned another legal aid lawyer, whom he did not meet prior to the appeal, and who failed to argue any grounds of appeal on the author's behalf. The author did not attend the appeal himself. It is stated that this constitutes at the same time a violation of article 14, paragraph 5, of the Covenant.

3.6 With respect to article 14, paragraph 5, of the Covenant, counsel further states that the author did not have access to the trial transcript and a duly reasoned summing up of the judge before the appeal. He argues that this effectively denied him the right to have his conviction reviewed by a higher tribunal.[80] In this connection, reference is made to the Committee's jurisprudence in relation to the communications of Raphael Henry (communications No. 230/1987) and Leaford Smith (communication No. 282/1988), where the Committee held that in order to enjoy the effective use of his right to have conviction and sentence reviewed by a higher tribunal, the convicted person is entitled to have, within a reasonable time, access to written judgements, duly reasoned, for all incidents of appeal.

3.7 Counsel submits that, at the review of the author's classification, the non-parole period of his sentence was set at twenty years[81] and stated to commence on the date of his classification as a non-capital offender, thereby failing to take into account the five years which he was held on death row at St. Catherine District Prison. In this connection it is submitted that the retrospective nature of Section 7 of the Offences Against the Persons (Amendment) Act 1992, which reclassifies prisoners already on death row, is contrary to both article 14 of the Covenant and the Jamaican Constitution. Counsel argues that under Section 7 of the Act the author was in fact convicted of a new offence, and should therefore have been afforded the rights of a full trial hearing. He was, however, not provided with any reasons for his classification as a non-capital offender or for the length of the sentence imposed on him, and was not given any opportunity to make any presentation concerning the classification by the single judge or to appeal against the sentence imposed on him by that judge.

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[80] No information is provided whether the author ever asked for a copy of the trial transcript and the summing up, and the author's counsel appears to have possessed a copy.

3.8 Counsel states that if the non-parole period of the author's sentence does not take into account the five years he spent on death row, it would be contrary to article 7, of the Covenant since he was held for such a substantial period as a condemned man. It is therefore requested that the Committee provides an appropriate remedy in relation to such a violation which in this case should be a recommendation that his sentence be reduced to take account of the time which the author spent in prison prior to his reclassification.

State party's submission and counsel's comments thereon

4.1 In its submission of 21 June 1996, the State party states that it will respond to the merits despite considering that the communication should be declared in admissible for failure to exhaust domestic remedies since the author has not sought review of his case by the Privy Council.

4.2 With respect to the alleged violation of article 7 because the period of time which the author was required to serve, following the reclassification of his offence, did not take into account the five years spent on death row, the State party holds that the question of parole is dealt with in section 7 of the Offences Against the Persons (Amendment) Act 1992. It provides that a judge may specify the time which a person has to serve before he is eligible for parole. Where no such period is specified, a minimum of 7 years must be served before a person can be eligible for parole. The Act does not specify the criteria which should be looked at in determining the period to be served. Rather the judge, in the exercise of his discretion, would look at all the relevant circumstances before making a recommendation. There is no requirement to take the period already served into account. Further unless it can be shown that, in exercising his discretion, the judge acted unreasonably or exceeded his authority in law, it cannot be argued that there was any breach of article 7.

4.3 With respect to the allegation of a breach of article 10 due to the ill-treatment the author received while on death row, the State party contends that it needs additional information as to the actual dates or approximate dates of the incident, the names of the warders and any other information available in respect of the incident in order to investigate it.

4.4 With regard to the violation of article 14, paragraph 3 (b), since the author was represented by a legal aid lawyer both on trial and on appeal not having adequate time to meet with them. The State party contends that it is its duty to provide competent legal aid counsel, the manner in which counsel chooses to represent his client and any failings therein cannot be attributed to the State party.

4.5 The State party rejects the allegation that there has been a breach of article 14, paragraph 5, because the author did not have access to his trial transcript and the duly reasoned summing up of the trial judge. The fact remains that legal aid counsel did represent the author before the Court of Appeal where his case was examined. Consequently, the State party rejects the view that any violation has occurred.

4.6 With respect to the purported breach of article 14, because of the retrospective nature of section 7 of the Offences Against the Persons (Amendment) Act 1992, in terms of the reclassification of offences, the State party notes that the author has alleged that this further constitutes a breach of the Jamaican Constitution. Having identified a constitutional breach it is incumbent upon the author to pursue a domestic remedy for that breach, before applying to the

Committee. Consequently, this part of the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

5.1 In his submission of 16 August 1996, counsel rejects the State party's affirmations that an appeal to the Privy Council is still open to the author. He points out that the author has not sought to have his case reviewed by the Judicial Committee of the Privy Council because the grounds on which the Privy Council will entertain an appeal from foreign countries in criminal matters are very limited. It has been established that it will rarely act as a court of criminal appeal as it limits appeals in criminal cases to those where in its opinion some matter of constitutional importance has arisen or where a substantial injustice has occurred. Given that the Privy Council's jurisdiction is therefore extremely narrow (and far more limited than the powers of the United Nations Human Rights Committee), the Applicant has not petitioned the Privy Council for special leave to appeal against judgement of the Court of Appeal of Jamaica as this is neither an available nor an effective remedy. In accordance with the advice given in writing by leading counsel, the author has not petitioned the Privy Council.

5.2 Counsel reiterates the original claim that a violation of article 7 of the Covenant has occurred as the time the author had already served on death row when he was reclassified under the Offences Against the Persons Amendment Act was not taken into account when establishing the non parole period he would have to serve. Counsel states that since the Act does not specify the criteria which should be looked at to determine the period to be served, it seems only reasonable that a judge would at least consider the period already served, when exercising his discretion.

5.3 With respect to the allegations of beatings by warders, counsel reiterates his claim and emphasizes that the State party has been provided with all the information available to him, which should be more than enough if there was a serious wish to investigate.

5.4 With regard to the allegation that the author did not have adequate representation due to the lack of time with defence counsel in order to prepare his defence, counsel reiterates that a breach of article 14, paragraph 3 (b), has occurred even if the State party refuses to accept responsibility for it.

5.5 Counsel accepts that the author's case was reviewed by the Court of Appeal but reiterates that the author did not have access to the trial transcript and duly reasoned summing up of the judge before the appeal on 11 July 1988, and consequently, there has been a violation article 14, paragraph 5, of the covenant.[82]

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With respect to the author's claim that he was not properly represented by his legal aid counsel on trial, since he met with him only for a short time prior to the trial and failed to follow his instructions in visiting the scene of the crime and did not call a defence witness in violation of article 14, paragraph 3 (b) and

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[82] From the file the Court of Appeal examined the case and counsel for the defence Mr. Chuck said that: "having gone through the record as carefully as possible, he could find no arguable ground on behalf of the applicant".

(e), the Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice. In the instant case, there is no reason to believe that counsel was not using other than his professional judgment. The Committee finds that in this respect, the author has no claim under article 2, of the Optional Protocol.

6.3 With regard to the author's allegations concerning irregularities in the court proceedings, improper instructions from the judge to the jury on the issue of interpretation of identification evidence, in particular that the identification warning given to the jury by the judge was inadequate and that the indication of the weakness in the evidence was unclear and unsatisfactory, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the courts of States parties to the Covenant to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties and not for the Committee to review the judge's instructions to the jury or the conduct of the trial, unless it is clear that the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality. The author's allegations and the trial transcript made available to the Committee do not reveal that the conduct of Mr. Gallimore's trial suffered from such defects. In particular, it is not apparent that the judge's instructions on how to interpret identification evidence, were in violation of his obligation of impartiality. Accordingly, this part of the communication is inadmissible, as non substantiated, pursuant to article 2 of the Optional Protocol.

6.4 With respect to the requirement of exhaustion of domestic remedies, the Committee has noted the State party's contention that the author has failed to petition the Judicial Committee of the Privy Council for special leave to appeal. The author's failure to petition this body cannot, however, be attributed to him, as in order to petition the Judicial Committee, as a poor person, the petition must be accompanied by an affidavit in support of the petition as well as the certificate of counsel that the petitioner has reasonable grounds of appeal. The author has not petitioned the Privy Council on the advice he was given in writing by leading counsel. In this respect, the Committee wishes to recall its constant jurisprudence[83] and finds, in the circumstances of this case, that the application to the Privy Council cannot be considered an effective remedy and does not constitute a remedy which must be exhausted by the author for the purposes of the Optional Protocol. The Committee therefore considers that it is not precluded by article 5, paragraph 2 (b), from considering the communication.

6.5 With regard to the State party's contention that the communication is inadmissible for failure to exhaust domestic remedies with respect to the possibility of filing a constitutional motion for an alleged breach of the Constitution in respect of Section 7 of the Offences Against the Persons, (Amendment) Act 1992, the Committee recalls its jurisprudence that for purposes of article 5, paragraph 2(b), of the Optional Protocol, domestic remedies must be both effective and available. It notes the State party's argument that a constitutional remedy was still open to the author, and observes that the Supreme Court of Jamaica has, in some cases, allowed applications for constitutional redress in respect of breaches of fundamental rights, after the criminal appeals in these cases had been dismissed. The Committee, however, recalls that the State party has indicated on several occasions that no legal aid was made available for constitutional motions.

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[83] Communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

It considers that, in the absence of legal aid, a constitutional motion does not constitute an available remedy which needs to be exhausted for purposes of the Optional Protocol.

6.6 The Committee, declares the rest of the claims admissible and proceeds, without further delay, to an examination of the substance of these, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 With respect to the author's claims of ill-treatment, the Committee notes that he has alleged beatings while in police custody, which the State party has failed to address altogether. Consequently, the Committee finds that due weight must be given to the allegations. With respect to the author's claim that he was beaten while in detention at St. Catherine District Prison and did not receive medical treatment for a hand injury, as a result of which he was unable to use his hand for 17 days, the Committee notes the State party's allegation that it required additional information as to the events. It also notes that Counsel has stated that the author raised the issue with the prison warders. In return the State party merely requests additional information and does not seem to have investigated the matter. It also notes that the letter from counsel informing the Committee of his inability to provide more information than that already submitted was transmitted to the State party in December 1996. In the absence of further information from the State party, the Committee considers that due weight must be given to the author's complaint and accordingly finds that the treatment he received at the hands of the authorities both while in police custody and later in detention are in violation of articles 7 and 10, paragraph 1, of the Covenant.

7.2 The author further claims that his rights under article 14, paragraph 1, were violated in the reclassification procedure in which the author's offense was classified as non-capital under Section 7 of the Offenses Against the Persons (Amendment) Act 1992 and the non-parole period was set to 15 years. It is submitted that the author was not provided with any reasons for the length of the non parole-period and was not given the opportunity either to make any contribution to the procedure or to appeal against the sentence imposed on him by the single judge. Even though a life sentence is prescribed by law for offenses reclassified as non-capital, the Committee notes that the judge when fixing the non-parole period exercises discretionary power conferred on him by the Amendment Act 1992 and makes a decision which is separate from the decision on pardon and forms an essential part of the determination of a criminal charge. The Committee notes that the State party has not contested that the author was not afforded the opportunity to make any submissions prior to the decision of the judge or the opportunity to seek review of that decision. In the circumstances, the Committee finds that article 14, paragraphs 1 and 3 (d) were violated.

7.3 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground that the time the author spent on death row (5 years) and the non-parole period of 15 years[84] set by the judge together amount to cruel and inhuman punishment, the Committee, recalls its constant jurisprudence that the period of time spent on death row does not per se constitute a violation of article 7. As to whether the combined effect of the five year on death row and the non-parole period of 15 years amounts to cruel and inhuman punishment, bearing in mind the nature of the offence, the Committee finds that there has been no violation of articles 7 and 10 in this regard.

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[84] See footnote 81.

7.4 With regard to counsel's claim that the author was not effectively represented on appeal, the Committee notes that the author's legal representative on appeal conceded that there was no merit in the appeal. The Committee recalls its jurisprudence[85] that under article 14, paragraph 3(d), the court should ensure that the conduct of a case by a lawyer is not incompatible with the interest of justice. While it is not for the Committee to question counsel's professional judgement, the Committee considers that in any criminal proceedings and in particular in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel. The Committee is of the opinion that in the instant case, Mr. Gallimore should have been informed that his legal aid counsel was not going to argue any grounds in support of his appeal, so that he could have considered any remaining options open to him. The Committee concludes that there has been a violation of article 14, paragraph 5, in respect to the author's appeal.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 10, paragraph 1 and article 14, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Gallimore with an effective remedy, including either reducing the non-parole period to the Amendment Act's minimum of seven years, or re-evaluating the non-parole period in a procedure that guarantees the enjoyment of the author's rights under article 14, or some other appropriate procedure. The State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[85] See, inter alia, the Committee's Views in cases Nos. 734/1997 (Anthony McLeod v. Jamaica), adopted on 31 March 1998, para. 6.3; and 537/1993 (Paul Anthony Kelly v. Jamaica), adopted on 17 July 1996, para. 9.5.

APPENDIX

Individual opinion by Hipólito Solari Yrigoyen

(partly dissenting)

I hold a dissenting opinion on paragraph 7.1. The author has made specific allegations of ill-treatment while detained in police custody and later in St. Catherine's Prison, where he suffered an injury to his hand which rendered it unusable for 17 days; according to his counsel, the prison authorities were apprised of the fact. The State party has provided no information on these claims, merely asking the Committee for further details: this is not proper in view of its obligation under article 4, paragraph 2, of the Optional Protocol. Nor has the Committee been informed whether any investigation into the matter was mounted. In the light of the foregoing, I consider that account must be taken of the author's accusations, and that the treatment the author suffered, both in police custody and in prison, violates articles 7 and 10, paragraph 1, of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

V. Communication No. 699/1996, Maleki v. Italy (Views adopted on 15 July 1999, sixty-sixth session)*

Submitted by:	Ali Maleki (represented by his son, Kambiz Maleki)
Alleged victim:	The author
State party:	Italy
Date of communication:	28 January 1999
Date of decision on admissibility:	15 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1999,

Having concluded its consideration of communication No. 699/1996 submitted to the Human Rights Committee by Ali Maleki, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Ali Maleki, a sixty-five-year-old Iranian citizen currently serving a 10-year prison sentence in Italy for drug trafficking. The case is submitted on his behalf by his son Kambiz Maleki. He claims that his father is a victim of violations by Italy of the International Covenant on Civil and Political Rights, although he does not specify which provisions of the Covenant he considers to have been violated.

The facts as submitted by the author

2.1 The author, a truck driver for over 40 years who transported consignments between Iran and Italy, was tried and sentenced, *in absentia*, on 21 November 1988 to 10 years imprisonment for having imported and sold narcotic drugs in Italy. His sentence was confirmed by the Court of Appeal on 16 October 1989.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 of the rules of procedure, Mr. Fausto Pocar did not participate in the consideration of the communication.

2.2 In 1991, while in California on a family visit, the author was arrested and detained for about six months, while awaiting his extradition to Italy. On 9 April 1992, the United States District Court, Central District of California, denied the Italian Government's request for his extradition. In May or June of 1995, the author returned to Iran via Italy. He was arrested at Rome airport, and has been detained since.

The complaint

3.1 The author claims that he was wrongly convicted, and that the case was one of mistaken identity based on one single tapped telephone conversation between him and a known drug dealer, who was also a truck driver and who had been under police surveillance for some time.

3.2 Kambiz Maleki alleges that his father was tried in his absence and that the Public Prosecutor's Office appealed the sentence twice in order to effectively bar his father from appealing.[86] This, he claims, means that domestic remedies have been exhausted or are unavailable. In support of his contention, he submits a letter from an Italian lawyer, which states that article 630 of the Criminal Code of Procedure precludes a reopening of the case and concludes that the only possibility remaining is to request the transfer of Mr. Maleki to Iran, to serve the remainder of the sentence there.

3.3 The author's son notes that the only connection in the file submitted by the Italian authorities to the United States in substantiation of the extradition request, contains one single reference to his father.

3.4 Kambiz Maleki adds that his father has been on a hunger strike to obtain a review of his conviction. He claims that his father has a serious heart ailment, having refused heart surgery while in the United States because he wanted to die in his native country. He claims that his father has also been denied the possibility of serving his sentence in his own country (Iran).

State party's information and author's comments thereon

4.1 In its submission of 17 September 1996, the State party explains that Mr. Maleki was tried and convicted in absentia, duly represented by his court-appointed attorney. The decision of the court of first instance was appealed both by Mr. Maleki's counsel and the public prosecutor. The State party assumes that he was informed by his counsel of the proceedings followed against him in Italy. He was charged for drug trafficking. When the authorities were unable to execute the warrant, he was declared a fugitive. The State party notes that when the author was arrested in the United States, he was assisted by an American attorney who argued against the extradition. It further notes that the Office of the Public Prosecutor informed Mr. Maleki of the ways and means still open to him for a revision or reversal of the judgments.

4.2 The State party contends that Mr. Maleki's medical condition is being closely monitored and submits a substantial file in this respect.

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[86] From a Statement made by the Office of the State Attorney General in Florence, it transpires that under Italian law, Mr. Ali Maleki could, once he surrendered to the Italian authorities, avail himself of the possibility of appealing both sentence and conviction.

4.3 The State party argues that the claims about unfair trial relate to the evaluation of facts and evidence in the case which is better left to the appellate Courts of States parties.

4.4 With respect to the claim that Mr. Maleki should be transferred to his own country (Iran) to serve his sentence, the State party notes that his petition could not be entertained in view of the fact that Iran is not a signatory to the Convention on the Transfer of Sentenced Prisoners (Strasbourg, 21 March 1983) nor is there a bilateral agreement on the matter between Italy and Iran.

5. In his comments Kambiz Maleki reiterates the claims that a trial *in absentia* constitutes a violation of the Covenant even if his father had a court-appointed lawyer, and that his father suffers from an acute heart condition for which he requires surgery.

Committee's decision on admissibility

6.1 Before considering any claim contained in a communication the Human Rights Committee must in accordance with rule 87 of its rules of procedure, decide whether or not it was admissible under the Optional Protocol to the Covenant.

6.2 As regards the author's complaint that he had a heart condition which was not being treated adequately, the Committee noted that the State party had submitted a comprehensive file showing that Mr. Maleki's medical condition was being closely monitored. In the circumstances, the Committee considered that the author had failed to substantiate this claim, for purposes of admissibility.

6.3 With respect to the author's complaint that he had not been transferred to his own country to serve his sentence, the Committee noted that the Covenant does not provide that an alien convicted and sentenced for a crime has a right to serve his sentence in his own country. Accordingly, this part of the communication was inadmissible ratione materiae.

6.4 The author's claim that he was tried in absentia was not contradicted by the State party. On the contrary, the State party conceded that the author was not present at his trial, but argued that he was represented by court-appointed counsel and that he therefore had a fair trial. The Committee was of the opinion that, in these circumstances, the author had substantiated, for the purposes of admissibility, his claims that his right to a fair trial, under article 14, paragraph 1, and his right, under article 14, paragraph 3 (d), to be tried in his presence, were violated, and these should be examined on their merits.

6.5 In deciding on admissibility the Committee was aware that upon ratification of the Covenant the State party made the following declaration: "The provisions of article 14, paragraph 3 (d), are deemed to be compatible with existing Italian provisions governing trial of the accused in his presence and determining the cases in which the accused may present his own defence and those in which legal assistance is required". The State party did not refer to this declaration in its detailed reply to the author's communication. The declaration's scope, and its effect on the author's claim of a violation of article 14, paragraph 3 (d), therefore remained unclear. The Committee decided that both the State party and the author could include in their replies on the merits arguments relating to the scope of the above declaration, and its effect on the admissibility of the author's claim under article 14. The Committee would examine such arguments together with the arguments on the merits.

6.6 The Human Rights Committee therefore decided that the communication was admissible.

States party's observations on the merits

7. In its submission, dated 18 February 1998, the State party in response to the Committee's decision on admissibility, raises two arguments:

a. That the declaration made by the State party upon ratification of the Covenant constitutes a reservation that precludes the Committee from holding that a trial in absentia, according to the law of the State party, violates the State party's undertakings under the Covenant. The communication should therefore be declared inadmissible;

b. Even if the communication were to be considered admissible, the provisions of Italian law regarding trial in absentia are compatible with article 14, paragraph 3 (d) as, inter alia, in certain circumstances they allow a person who has been tried in absentia to apply for a retrial in his or her presence.

8. The author's son, who represents his father in this communication, informed the Committee that he does not intend to submit further arguments, and the Committee can therefore proceed to examine the arguments raised by the State party.

Issues and proceedings before the Committee

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

9.2 The State party's argument is that its declaration concerning article 14, paragraph 3 (d) is a reservation that precludes the Committee examining the author's argument that his trial in absentia was not fair. However, that declaration deals only with article 14, paragraph 3 (d), and does not relate to the requirements of article 14, paragraph 1. The State party itself has argued that its legal provisions regarding trial in absentia are compatible with article 14, paragraph 1. Under this provision, basic requirements of a fair trial must be maintained, even when a trial in absentia, is not, ipso facto, a violation of a State party's undertakings. These requirements include summoning the accused in a timely manner and informing him of the proceedings against him.

9.3 The Committee has held in the past that a trial in absentia is compatible with article 14, only when the accused was summoned in a timely manner and informed of the proceedings against him.[87] In order for the State party to comply with the requirements of a fair trial when trying a person in absentia it must show that these principles were respected.

9.4 The State party has not denied that Mr. Maleki was tried in absentia. However, it has failed to show that the author was summoned in a timely manner and that he was informed of the proceedings against him. It merely states that it "assumes" that the author was informed by his counsel of the proceedings against him in Italy. This is clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused in absentia. It was incumbent on the court that tried the case to verify that the author had been informed of the pending case before proceeding to hold the trial in absentia. Failing evidence that the court did so, the Committee is of the opinion that the author's right to be tried in his presence was violated.

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[87] Committee's Views on communication No. 16/79 (Mbenge v. Zaire).

9.5 In this regard the Committee wishes to add that the violation of the author's right to be tried in his presence could have been remedied if he had been entitled to a retrial in his presence when he was apprehended in Italy. The State party described its law regarding the right of an accused who has been tried in absentia to apply for a retrial. It failed, however, to respond to the letter from an Italian lawyer, submitted by the author, according to which in the circumstances of the present case the author was not entitled to a retrial. The legal opinion presented in that letter must therefore be given due weight. The existence, in principle, of provisions regarding the right to a retrial, cannot be considered to have provided the author with a potential remedy in the face of unrefuted evidence that these provisions do not apply to the author's case.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Maleki with an effective remedy, which must entail his immediate release or retrial in his presence. The State party is under an obligation to ensure that similar violations do not occur in the future.

12. Bearing in mind that by becoming a State party to the Optional Protocol, Italy has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

W. Communication No. 709/1996, Bailey v. Jamaica (Views adopted on 21 July 1999, sixty-sixth session)*

Submitted by:	Everton Bailey (represented by Mr. Anthony Poulton of the London law firm McFarlanes)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	23 April 1996
Prior decision:	Special Rapporteur's rule 91 decision, transmitted to the State party on 8 August 1996
Date of decision on admissibility:	21 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 July 1999,

Having concluded its consideration of communication No. 709/1996 submitted to the Human Rights Committee by Mr. Everton Bailey under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Everton Bailey, a Jamaican national, serving a life sentence at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7, 10(1), 14(1), 14(3) (b) and (e)

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The texts of two individual opinions by five Committee members are appended to the present document.

and 14(5) of the International Covenant on Civil and Political Rights.[88] He is represented by Mr. Anthony Poulton of the London law firm McFarlanes.

Facts as submitted by the author

2.1 The author was convicted of the murder on 17 March 1979 of Abraham McKenzie, a police officer. He was sentenced to death on 9 November 1979 by the Home Circuit Court in Kingston, Jamaica. His appeal was dismissed by the Court of Appeal on 10 April 1981. Between 1981 and 1992 the author was represented by two law firms, both of which failed to take his case before the Judicial Committee of the Privy Council in London. In 1992, the author's case was transferred to the present counsel, who filed an application for special leave to appeal to the Judicial Committee of the Privy Council. On 20 February 1995, the author's petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed.

2.2 On 7 January 1993, the author's offence was reclassified as a non-capital crime pursuant to the Offenses Against the Person (Amendment) Act 1992 by a single judge of the Court of Appeal of Jamaica. The non-parole period of the author's sentence was set to 20 years from the date of his reclassification. Thus, the earliest possible date of his parole is in the year 2013.

2.3 The author claims that in 1979 he was arrested at home by the local police approximately two weeks after the murder. He claims that his arrest was based on false statements given to the police by his ex-girlfriend and her sister, who told the police of recent arguments between them and falsely stated that the author possessed a gun.[89] Both women have since retracted their statements.

2.4 The case for the prosecution was one of identification. The Crown alleged that on 17 March 1979, the deceased went to visit a certain shop at 21 Heywood Street. There, a witness saw him struggle with a still unidentified man. Shots were heard and Mr. McKenzie was found dead as the result of multiple gunshot wounds. On 18 April 1979, the author took part in an identification parade, where he was identified by four witnesses as the man they had seen leaving the yard where Mr. McKenzie was found dead, placing a handgun in the waistband of his pants as he left. One witness failed to pick anyone from the identification parade. Some witnesses also claimed to have seen a second man at the gate at the time of the shooting. A handgun was discovered at the scene, but it had only been fired once and the bullet from it was found at the scene. Two other bullets removed from the body of the deceased had been fired by a different type of handgun. The Crown alleged that there had been two different gunmen involved in the murder and called evidence that the weapon left at the scene was not of the type carried by police officers.

2.5 The defence was one of alibi. The author claims that he was at home the entire day of the shooting, in the presence of two witnesses, Trevor Francis and Glenden Williams. Both witnesses were subpoenaed to testify on behalf of the defence, but neither of them attended court the day the defence evidence was presented. Upon failure to locate the witnesses the defence motioned for an adjournment, which was granted. Two hours later, when court readjourned, the witnesses had still not been located, and the judge ruled that the defence had rested. The author, who gave sworn evidence, was thus the only one to testify for the defence.

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[88] The author also submitted Communication No. 303/1988 on 25 May 1988, which was deemed inadmissible for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol.

[89] It appears from the trial transcripts that the alleged statements by the author's ex-girlfriend and her sister were never mentioned in court and were relied on only to arrest the author.

The complaint

3.1 Counsel alleges that article 14 of the Covenant has been violated on several grounds. Firstly, it is submitted that article 14, paragraph 1, was violated as the judge erred in his instructions to the jury regarding the danger of a conviction based solely on identification evidence, and further that the judge erred by allowing testimony that the defendant remained silent each time he was identified at the parade, thus implying his guilt. The judge in fact questioned the defendant in front of the jury about his silence, allegedly implying that his silence was proof of his guilt.

3.2 Secondly, it is submitted that article 14, paragraph 1, was violated as the identification evidence adduced by the prosecution was seriously deficient. The author claims that the five witnesses to the identification parade, three of whom testified at the trial, were "bogus", and that the evidence could not warrant a conviction. With regard to the alleged wrongful conviction, counsel also makes reference to the statements given in 1987 to the Jamaica Council for Human Rights by the author's ex-girlfriend, her sister and the owner of a shop situated close to the murder scene. In these statements, the ex-girlfriend and her sister claim that they lied to the police when telling them that the author was the owner of a gun. The ex-girlfriend's sister also claims that she wanted to testify but that the police had told her that they were "going to lock us up and charge us for perjury". Furthermore, the ex-girlfriend states that "the people in the neighbourhood ... know that he did not kill the Inspector". The shop owner, one L.N., claims in his statement that he at the time of the murder had heard a gunshot and that he had gone outside where he saw the deceased wrestling with "a tall, slim, dark man" (as opposed to the author who allegedly is short and stout) and that he later found a gun which he handed over to the police. L.N. further states that he attended two preliminary hearings, but that he since this heard nothing before he heard that the author was to be executed. Also with regard to the alleged wrongful conviction, a Jamaican citizen assisting the author on a private basis claims to have spoken to several people who maintain that the author was not present at the scene of the murder.

3.3 Thirdly, counsel alleges a violation of article 14 on the ground that after the prosecution rested its case, the judge allowed a "no case to answer" submission to be heard in front of the jury. After the submission, the judge ruled, "On this evidence, I have ruled that there is a case for the accused to answer,"in the presence of the jury. Counsel submits that allowing "no case to answer" submissions in front of the jury is contrary to established jurisprudence of the Privy Council in London.

3.4 Fourthly, counsel alleges a violation of article 14, paragraphs 1, 3(b) and 3(e), as the author did not have sufficient time to prepare his case with his attorneys before the trial and that the defence offered by the legal aid attorneys therefore was inadequate. It is stated that the author only met his attorneys the day before the trial and that they did not go through the statements made by prosecution witnesses or discuss the nature of the prosecution's case against him. Furthermore, counsel claims that the legal aid lawyers failed to include in the defence important evidence brought to their attention by the author, including the fact that the statements given by his ex-girlfriend and her sister had been precipitated by malicious motives and were subsequently retracted in sworn statements to the Jamaica Council on Human Rights and that the legal aid lawyers refused to call witnesses on the author's behalf even when requested to do so. It is further submitted that the trial attorneys' failure to ensure the attendance of the vital alibi witnesses, Trevor Francis and Glendon Williams, and the fact that the author was convicted notwithstanding their absence, is a breach of article 14, paragraph 3(c).

3.5 Fifthly, counsel alleges a violation of article 14, paragraphs 3(b) and 5, in the proceedings before the Court of Appeal, as the author was deprived of the opportunity to adequately prepare his appeal with counsel, that his new legal aid lawyer failed to file appropriate grounds of appeal and that his lawyer inexplicably abandoned four of the five grounds which in fact were filed.

3.6 In his first communication to the Committee (No. 303/1988), the author also complained that the Court of Appeal had addressed his appeal in an oral judgement, and that his representatives had merely been provided with the notes of this judgement. The author expressed fear that in the absence of a duly reasoned judgement, his petition for special leave to appeal to the Judicial Committee of the Privy Council would inevitably fail. Counsel in the present communication requests, in general terms, that the Committee examines also the claims set forth in the previous communication.

3.7 Finally, counsel claims that the author's rights under article 14, paragraph 1, were violated in the reclassification procedure in which the author's offence was classified as non-capital under section 7 of the Offenses Against the Persons (Amendment) Act 1992 and the non-parole period was set to 20 years from that time. Counsel submits that the author "was in effect convicted of a new offence and therefore should have been afforded the rights of a full trial hearing". In this regard, counsel claims that the author was not provided with any reasons for his classification as a non-capital offender or for the length of the non-parole period and that he was not given an opportunity to make any contribution to the procedure before he single judge.

3.8 Counsel submits that when setting the non-parole period of the author's sentence, the 14 years that he had already spent on death row were not taken into account, and that this amounts to a violation of articles 7 and 10(1) of the Covenant because being held as a condemned man for such a substantial period must be deemed as cruel, inhuman or degrading treatment.

3.9 The author also claims that because of the appalling conditions at St. Catherine's District Prison he has been a victim of cruel, inhuman and degrading treatment in violation of articles 7 and 10(1). Reference is made to Amnesty International's report from a visit at the prison in November 1993 and a report denoted as Prison Conditions in Jamaica, 1990, Human Rights. Counsel also alleges, in general terms, that the author has been ill-treated and brutalized since his arrest.

3.10 Counsel contends that, in practice, constitutional remedies are unavailable to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, paragraph 2(b) of the Optional Protocol. It is stated that the case has not been submitted to another procedure of international investigation or settlement.

State party's submission and counsel's comments

4.1 In its submission of 16 December 1996, the State party, "in the interest of expediting the processing", offers its comments also on the merits of the communication.

4.2 As to the alleged violations of article 14, paragraphs 3(b) and 5, because of inadequate time for preparation of the defence and the manner in which the legal aid lawyers conducted the trial and the appeal, the State party claims that these are not breaches of the Covenant for which it can be held responsible. It submits that its duty is to provide competent legal counsel, but that it is not responsible for the manner in which he conducts the case, e.g. in deciding which grounds of appeal to argue.

4.3 With regard to the alleged violation of article 14, paragraph 3(e), on the ground that the two defence witnesses did not appear at the trial, the State party comments that it is not clear whether they were subpoenaed or if they were made aware that they should attend court and chose not to do so. The State party argues that, nevertheless, the witnesses' non-attendance is not a breach which can be attributed to the State unless it can be shown that the State by act or omission prevented them from giving evidence.

4.4 With reference to the alleged violation of articles 7 and 10 on the ground that the time the author had spent on death row was not taken into consideration when his non-parole period was set under the Offenses Against the Persons (Amendment) Act 1992, the State party replies that the Act allows judges to decide that a prisoner must serve a particular period of time before being eligible for parole and that the judge in making this determination takes all relevant circumstances into account. This exercise of judicial authority is entirely appropriate and does not constitute any breach of the Covenant.

5.1 In his submission of 4 March 1997, counsel states that, on the author's behalf, he has no objections to a combined examination of the admissibility and the merits of the communication.

5.2 Counsel notes that the State party admitted that it was under an obligation to provide competent legal counsel, and submits that it clearly failed to do this in the author's case. Counsel argues that the liability for defence counsel's failures must fall to the State in circumstances where the State's failure to provide adequate support and remuneration for legal aid representation can only result in representation of a standard which falls below the level of acceptable competence.

5.3 In relation to the failure of the two defence witnesses to appear in court, counsel submits that it has been demonstrated that the State, by its omission in the failure by the police force to arrange transportation, prevented the defence witnesses from giving evidence.

5.4 Finally, counsel notes that the State party does not deny that no written judgement of the Court of Appeal was delivered in the author's case. It is submitted that this is in breach of article 14, paragraph 5, of the Covenant. Reference is made to the Committee's jurisprudence.[90]

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[90] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991.

Consideration of admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the alleged violation of article 14 on the ground that the identification evidence was seriously deficient and the conviction wrongful, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. With regard to the alleged violations of article 14 on the ground of improper instructions from the trial judge on the issue of identification evidence and on the ground that he allowed a "no case to answer" submission to be heard in front of the jury, the Committee can therefore only examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. However, the material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from any such defects either. Accordingly, this part of the communication is also inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.5 The author has claimed that he has been held on death row in appalling conditions in violation of articles 7 and 10, paragraph 1. The Committee notes that the State party has not addressed this issue. However, the author has neither provided any details in relation to the conditions of detention he is subjected to, nor has he ever complained about this to the relevant authorities. In the circumstances of the case, the Committee recalls the general requirement that an author must substantiate that he is a victim of the alleged violation. In the instant case, the Committee therefore finds that the communication is inadmissible for non-substantiation under article 2 of the Optional Protocol. Similarly, the Committee finds that the author's claim that he has been ill-treated and brutalized since his arrest, is inadmissible under the same provision for lack of substantiation.

6.6 The Committee declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 The author has claimed that the standard of his defence "fell below the level of acceptable competence" because he was not afforded sufficient time with his legal aid lawyers to prepare for his trial. In particular, it is submitted that the legal aid lawyers failed to include in the defence important evidence brought to their attention by the author, including the fact that the statements made by his ex-girlfriend and her sister had been precipitated by malicious motives. It is also submitted that the legal aid lawyers refused to call witnesses on the author's behalf even when requested to do so. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. The Committee notes that neither the author nor his counsel requested an adjournment and that witnesses on behalf of the author in fact were subpoenaed. As regards the statements given by the author's ex-girlfriend, her sister and the shop-owner, one L.N., the Committee notes that none of these were given until some eight years after the trial and that L.N., as opposed to what is held forth in his statement, in fact did give testimony at the trial. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

7.2 Similarly, as to the alleged violation of article 14, paragraphs 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that the new counsel in fact argued grounds of appeal on the author's behalf before the Court of Appeal. There is nothing in the file which suggests that counsel was exercising other than his professional judgement when choosing not to pursue certain grounds. Nor is there anything in the file to suggest that the State party denied the author and his counsel time to prepare the appeal or that it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. With reference to its prior jurisprudence, the Committee notes that it has found violations of the provisions in question in situations where counsel has abandoned all grounds of appeal and the court has not ascertained that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which counsel argued the appeal, but chose not to pursue certain grounds. The Committee concludes, therefore, that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

7.3 With regard to the claim that the failure of the two subpoenaed witnesses to appear before the court should be attributed to the State party as a violation of article 14, paragraph 3(e), the Committee finds that the author has not substantiated his claim that the authorities, by failure to secure adequate arrangements for transportation, de facto denied the author an opportunity to obtain witnesses. In this context, the Committee also notes that this was not made a ground of appeal before the Court of Appeal. On the basis of the material before it, the Committee therefore concludes that there has been no violation of the Covenant in this regard.

7.4 With regard to the alleged violation of article 14, paragraph 5, on the ground that the Court of Appeal did not issue a duly reasoned judgement, the Committee recalls its prior jurisprudence[91] where it has held that in order to enjoy the right to have his conviction and sentence reviewed by a higher tribunal according to law, a convicted person is entitled to have, within a reasonable time, access to duly reasoned, written judgements. Even though article 14, paragraph 5, itself merely guarantees one instance of appeal, the Committee has interpreted the words "according to law" to mean that the right to duly reasoned, written judgements must apply to all instances of appeal provided in the domestic law.[92] Consequently, the Committee has found violations in cases where no written judgement has been provided within a reasonable time. In the present case, the Committee notes that the author and his representatives were provided with the notes of the oral judgement delivered by the Court of Appeal on 20 March 1981, and finds that these notes, even if less elaborate than desirable, were sufficient to form the basis of a further appeal. Consequently, the Committee finds that article 14, paragraph 5, was not violated on this ground.

7.5 The author further claims that his rights under article 14, paragraph 1, were violated in the reclassification procedure in which the author's offence was classified as non-capital under section 7 of the Offenses Against the Person (Amendment) Act 1992 and the non-parole period was set to 20 years. It is submitted that the author was not provided with any reasons for the length of the non-parole period and was not given the opportunity to make any contribution to the procedure before the single judge. Even though a life sentence is prescribed by law for offences reclassified as non-capital, the Committee notes that the judge when fixing the non-parole period exercises discretionary power conferred on him by the Amendment Act 1992 and makes a decision which is separate from the decision on pardon and forms an essential part of the determination of a criminal charge. The Committee notes that the State party has not contested that the author was not afforded the opportunity to make any submissions prior to the decision of the judge. In the circumstances, the Committee finds that article 14, paragraphs 1 and 3 (d), were violated.

7.6 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground that the time the author spent on death row (14 years) and the non-parole period of 20 years set by the judge together amount to cruel and inhuman punishment, the Committee recalls its constant jurisprudence that the period of time spent on death row does not per se constitute a violation of article 7. As to whether the combined effect of the 14 years on death row and the non-parole period of 20 years amounts to cruel and inhuman punishment, bearing in mind the nature of the offence, the Committee finds that there has been no violation of article 7 or 10 in this regard.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraphs 1 and 3 (d) of the International Covenant on Civil and Political Rights.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Bailey with an effective remedy, including re-evaluating the non-parole period in a procedure guaranteeing the enjoyment of the author's rights under article 14 or some other appropriate procedure. The

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[91] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991; communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

[92] Communication No. 230/1987 (Raphael Henry v. Jamaica), Views adopted on 1 November 1991, para. 8.4.

State party is under an obligation to ensure that similar violations do not occur in the future.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Hipólito Solari Yrigoyen
(partly dissenting)

I hold a dissenting opinion on paragraph 6.5. The author has alleged that he was held on death row in appalling conditions, in breach of articles 7 and 10, paragraph 1, of the Covenant. He has also specifically alleged that after being detained he was beaten and brutalized, implying that he suffered cruel, inhuman and degrading treatment during the 14 years he spent on death row. Although advised of this accusation, the State party has remained silent on the subject and has not indicated whether any investigation was mounted. It has thus not honoured its obligation under article 4, paragraph 2, of the Optional Protocol.

In support of his accusation, but without appending the documents cited, the author refers to reports by Amnesty International on treatment at St. Catherine's Prison and on prisons in Jamaica which overlap with the period of his detention. I consider that the author's accusation is admissible as regards the claimed violation of article 10, paragraph 1, of the Covenant.

I also maintain a dissenting opinion on paragraph 7.6. The author alleges a violation of articles 7 and 10, paragraph 1, of the Covenant, on the grounds that he spent 14 years on death row. While the Committee holds that in the case of individuals facing the death penalty the length of time spent on death row does not of itself constitute a breach of article 7, this jurisprudence does not apply here for two reasons: first, because of the ill-treatment suffered, as mentioned in paragraph 6.5, and second, because the offence, by virtue of its reclassification, is not punishable by death, and the 14 years spent by the author on death row thus constitute a disproportionate term which justifies admissibility of the claimed violation of articles 7 and 10, paragraph 1.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Elizabeth Evatt, co-signed by Pilar Gaitán de Pombo, Cecilia Medina Quiroga and Maxwell Yalden

(partly dissenting)

In this case, the Committee found inadmissible the author's claim that he has been a victim of inhuman and degrading treatment in violation of article 10(1) of the Covenant because of the appalling conditions in which he was detained at St. Catherine's District Prison. The author has not given specific details of this claim, other than to refer in his submission to a report from Amnesty International based on a 1993 visit and a report called Prison Conditions in Jamaica, 1990. These reports, which are not annexed, cover a period during which the author was held in St. Catherine's District Prison. Having regard to the Committee's earlier views in which it has found the conditions on death row in St. Catherine's District Prison to violate article 10(1) of the Covenant, and to the failure of the State party to respond to the author's allegations, I am of the view that the author's claim under article 10(1) is sufficiently substantiated for the purpose of admissibility and to support a finding of a violation of this provision.

(Signed) Elizabeth Evatt

(Signed) Pilar Gaitán de Pombo

(Signed) Cecilia Medina Quiroga

(Signed) Maxwell Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

X. Communication No. 710/1996, Hankle v. Jamaica (Views adopted on 28 July 1999, sixty-sixth session)*

Submitted by:	Winston Hankle (represented by the London law firm Herbert Smith)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	11 August 1995
Date of decision on admissibility:	28 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 July 1999,

Having concluded its consideration of communication No. 710/1996 submitted to the Human Rights Committee by Mr. Winston Hankle under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Winston Hankle, a Jamaican citizen currently incarcerated in the Gun Court Rehabilitation Centre in Jamaica. The author claims to be a victim of violations by Jamaica of articles 7 and 14, paragraphs 1, 3(b) and 3(d), of the International Covenant on Civil and Political Rights. He is represented by the London law firm Herbert Smith.

The facts as submitted by the author

2.1 The author was arrested on 28 March 1990, for the murder of Clive Wint, which allegedly took place on 10 July 1989 and was detained for seven weeks before he was charged. The author was convicted and sentenced to death on 22 November 1990. His appeal was heard and dismissed on 23 March 1992. Shortly after, the author's crime was re-classified as non-capital and his death sentence was commuted to life imprisonment with a non-parole period of twenty years pursuant to the provisions of the Offenses Against the Person (Amendment) Act 1992. The author's petition for special leave to appeal to the Judicial Committee of the Privy Council in London was refused on 4 November 1993.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of an individual opinion by Committee member Christine Chanet is appended to the present document.

2.2 The prosecution's case was based mainly on the testimony of three witnesses to Wint's murder. All three gave evidence that in the early morning hours of 10 July 1989, a masked gunman (the killer allegedly had a plastic hairnet, also known as a "jherri bag," over his face) stepped out from behind a streetlight, exchanged a few words with Wint, and proceeded to shoot Wint several times. All three witnesses testified that Wint was shot at close range and that the gunman held the gun in his left hand. Two of the witnesses testified that the author and the deceased had quarrelled earlier in the evening at a dance at a club called "Lovers Hideout", and that their quarrel had ended with the author stating that he was going to get his gun. Upon his death, the deceased allegedly said, "See how Blackie shot me fo nutten" ("Blackie" is the author's commonly used nickname.)

2.3 The author's sole defense was a statement he made from the dock, stating that he was at the dance club on the evening in question, but that he left and went home with his girlfriend, Janet Campbell, at approximately 2:30 a.m., and thus was not present at the shooting. The author also stated that neither was he left-handed, nor had he ever worn a "jherri" bag. No other evidence was called in support of the author's defense, despite the author allegedly telling his counsel that Janet Campbell was willing to testify as an alibi witness.

2.4 The author further states that no identification parade was held in this case, even though the prosecution's case was based mainly on identification. A police officer who testified for the prosecution stated that he did not feel that an identification parade was necessary since all three witnesses had known the author for years and identified him by name.

The complaint

3.1 The author claims to be a victim of a violation of article 7 of the Covenant. It is submitted that the cumulative effect of the delays in his case, further exacerbated by the fixation of the 20 years non-parole period, amount to a violation of the said provision.[93]

3.2 The author claims to be a victim of a violation of the right to a fair trial as provided for in article 14, paragraph 1. Firstly, it is submitted that there were a number of inconsistencies in the case of the prosecution. Secondly, it is submitted that both the trial judge and the Court of Appeal erred in deciding that it was not necessary to leave the question of legal provocation to the jury. The author states that there was evidence that a third party borrowed a knife from the deceased in order to wound him. It is further submitted that the judge should have dismissed the jurors after they heard the prosecutor ask for an adjournment on the ground that the prosecution witnesses were afraid to testify because they had been threatened. In his summation, the judge instructed the jury to disregard the fact that the witnesses were afraid to come to court, and not to engage in any type of speculation about why they may have been afraid.

3.3 In addition, the author states that the judge should have withdrawn the case from the jury because of 1) the failure of the arresting officer to take a statement from the witnesses until a week after the shooting, 2) the fact that the three witnesses did not positively identify the murderer as the author until he was arrested, almost a year after Wint's murder, and 3) because the circumstances of the identification the night of the murder were such that witnesses allegedly were not in a position to identify the masked gunman other than as a man of deep black skin.

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[93] No claim has been made either under article 9, paragraphs 2 and 3, or article 14, paragraph 3(c), with regard to the alleged delays. Nor has any claim been made under article 14 with regard to the decision stipulating the non-parole period.

3.4 The author also claims to be the victim of a violation of article 14, paragraphs 1, 3(b) and 3(d), on the ground that he did not have adequate legal representation either during the trial or on appeal. On both occasions the author was represented by a privately retained attorney. It is submitted that the author was interviewed by his attorney only briefly on three occasions, twice prior to the commencement of the trial and once prior to his appeal. The author states that no evidence was called to support his alibi, even though the author expressed his wish that Janet Campbell testify to his lawyer.

3.5 The author further claims that his attorney failed to challenge a police officer's testimony that the author told him that he was present at the scene of the shooting and involved in a struggle with the deceased, during the course of which the deceased was shot in the arm. The trial judge proceeded to comment on counsel's failure to cross-examine on this issue, saying that counsel should have first established whether or not the statement had been made, before choosing not to challenge the officer's testimony. In addition, the author claims that he was not given the opportunity to hold a meeting with his lawyer at any time during the trial, nor to read the prosecution witness statements. The author states that his lawyer fell asleep during the trial and that the author had to wake him.

3.6 It is stated that the same matter has not been submitted to another procedure of international investigation or settlement. Counsel also argues that all available domestic remedies have been exhausted for the purposes of article 5, paragraph 2(b), of the Optional Protocol. While a constitutional motion might be open to the author in theory, it is not available in practice due to the State party's unwillingness or inability to provide legal aid for such motions and to the extreme difficulty of finding a Jamaican lawyer who would represent an applicant pro bono on a constitutional motion.

State party's submission and counsel's comments thereon

4.1 In its submission of 30 September 1996, the State party offers its comments on the merits of the communication and does not challenge the admissibility.

4.2 The State party rejects the author's assertion that there was any breach of article 7 because of delays. It argues that the author was convicted approximately nine months after his arrest and that his appeal and petition to the Privy Council were completed within a further two years. It is submitted that this period does not constitute the type of delay which would amount to a breach of the Covenant.

4.3 The State party notes that the allegation of breaches of article 14 stem from the court's rejection of defense counsel's submission of no case to answer, the manner in which defense counsel conducted the case, the manner in which the trial judge dealt with several questions and the fact that the Court of Appeal upheld the trial judge's decision. It is submitted that the Committee's jurisprudence on the circumstances in which it will review the trial judge's instructions to the jury is clear, and that none of those circumstances are applicable to the present case. With regard to the conduct of defense counsel, the State party argues that he was privately retained and conducted the case according to his own discretion, and denies that his conduct can be attributed to the State in such a manner as to constitute breach of the Covenant.

5. In his letter of 6 November 1996, counsel refers to the claims contained in the original submission, and states that he has no objections to a joint examination of the admissibility and the merits of the communication.

Consideration of admissibility and examination of the merits

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party in its submission has addressed the merits of the communication and that counsel on behalf of the author has agreed to a combined examination. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the alleged violation of article 7 on the ground of the cumulated effect of the delays in charging and trying the author and the fixation of the non-parole period to twenty years, the Committee finds that this claim, for purposes of admissibility, cannot be considered sufficiently substantiated, and accordingly decides that it is inadmissible under article 2 of the Optional Protocol.

6.4 The author has alleged a violation of article 14 on the ground of inconsistencies in the prosecution's case and that the judge erred in not withdrawing the case from the jury on account of 1) the failure of the arresting officer to take a statement from the witnesses until a week after the shooting, 2) the fact that the three eye witnesses did not positively disclose the identity of the murderer until almost a year after the murder, and 3) that the circumstances on the night of the murder were such that it was not possible to make a precise identification. It is also submitted that the judge erred in deciding that the question of legal provocation need not be left to the jury, because there was evidence that the deceased had borrowed a knife from a third party to wound the author. The Committee notes that all these allegations relate to the courts' evaluation of the facts and evidence of the criminal case, and reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.5 With regard to the alleged violation of article 14 on the ground of the judge's decision not to dismiss the jurors after they heard the prosecutor ask for an adjournment as the prosecution witnesses allegedly had been threatened and the subsequent instructions from the judge to the jury on this point, the Committee reiterates that it is generally for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. The Committee can therefore only examine whether the judge's decision and instructions were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. However, the material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from any such defects either. Accordingly also, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.6 The Committee declares the remaining claim under article 14 admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7. The author claims that he is a victim of a violation of article 14, paragraphs 3(b) and 3(d), as he was not afforded adequate time and facilities for the preparation of his defence and that he was inadequately represented both at the trial and on appeal (paras. 3.4 and 3.5 supra). In this context, the Committee recalls that sufficient time must be granted to the accused and his counsel to prepare the defense, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defense lawyers unless it has denied the author and his counsel time to prepare the defense or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. The Committee notes that neither the author nor his counsel requested an adjournment and that counsel, according to the author himself, explained to the author that calling Ms. Janet Campbell "would not be necessary". It is not for the Committee to second-guess the professional judgment of defense counsel, and, in the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose any violations of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Christine Chanet

My reservations apply solely to paragraph 6.3, in which the Committee rules the communication inadmissible for want of sufficient prima facie substantiation concerning the fixation of the non-parole period at 20 years.

If article 7 had not been invoked on this point, article 10, paragraph 3, which states "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation ...", should have prompted the Committee to admit the communication and examine on its merits the compatibility of a mandatory penalty of 20 years with a text stipulating that the aim of that penalty is to rehabilitate the offender.

The question to be argued should have been the following: does not the inability to modify the penalty for such a long period constitute an obstacle to the social rehabilitation of the prisoner?

The Committee did not in fact require much evidence to uphold the author's complaint, since the length of the sentence and its mandatory nature were facts the State party did not contest.

(Signed) Christine Chanet

[Done in English, French and Spanish, French being the original version). Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Y. Communication No. 716/1996, Pauger v. Austria (Views adopted on 25 March 1999, sixty-fifth session)*

Submitted by: Dietmar Pauger

Victim: The author

State party: Austria

Date of communication: 22 January 1996

Date of decision on admissibility: 9 July 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Having concluded its consideration of communication No.716/1996 submitted to the Human Rights Committee by Mr. Dietmar Pauger under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Dietmar Pauger, an Austrian citizen and widower of a former school teacher in the Austrian civil service. He claims to be a victim of a violation by Austria of article 26 of the International Covenant on Civil and Political Rights. The present communication is a follow-up to a previous complaint the author had submitted to the Human Rights Committee for consideration under the Optional Protocol.

The facts as submitted by the author

2.1 The author's first wife, a school teacher in the State party's civil service in the region of Styria (Steiermark), died on 23 June 1984. With effect of November 1985, the author was entitled to a widower's pension, which was calculated on the basis of the transitional provisions of the Eighth Amendment to the Austrian Pensions Act (Pensionsgesetz). Until January 1995, this Amendment only provided for a reduced widower's pension, amounting to two thirds of the full pension entitlement. Widows, however, were entitled to the full pension.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 The author initiated proceedings with a view to securing a full widower's pension; before the State party's Constitutional Court, he contended that the provisions of the Eighth Amendment to the Austrian Pensions Act were discriminatory and, therefore, unconstitutional. The Constitutional Court ruled that the transitional provisions reflected continuing changes in society with respect to the principle of equality of sexes and dismissed the author's appeal on 3 October 1989.

2.3 The author subsequently submitted a communication to the Human Rights Committee, alleging a violation of article 26 of the Covenant.[94] On 30 March 1992, the Committee found that the award of a reduced widower's pension to the author, calculated on the basis of the transitional provisions of the Eighth Amendment to the Pensions Act, constituted unlawful discrimination on the grounds of sex, in violation of article 26 of the Covenant. According to the author, the State party's authorities have failed to readjust and re-calculate his pension entitlements, in spite of the findings of the Committee of 30 March 1992.

2.4 On 4 October 1991, the author remarried. Under Section 21 of the Austrian Pensions Act, Mr. Pauger was entitled to a one-time lump-sum payment (Abfindungszahlungen) in the amount of 70 monthly pension payments to which he was entitled at the time of his re-marriage, and which replaced his previous pension entitlements. The Styria Regional Education Board (Landesschulrat) accordingly commuted the author's entitlement to a widower's pension and awarded a lump-sum payment of AS 423,059, calculated on the basis of his reduced pension entitlements.

2.5 On 8 November 1991, Mr. Pauger appealed against the decision of the Styria Regional Education Board, arguing that the calculation of the lump-sum should be based on his full pension entitlement. On 9 January 1992, the regional government of Styria dismissed the appeal.

2.6 The author further appealed this decision to the Supreme Administrative Court (Verwaltungsgerichtshof) of Austria. On 28 September 1993, the Court found that the one-time lump-sum payment had to be considered as a single payment of the monthly instalments the applicant would receive in the years following his remarriage. As the author would have been entitled to a full pension from 1 January 1995 onwards, the 70 monthly instalments had to be calculated differently depending on the dates of reference. Those instalments corresponding to pension payments before 1 January 1995 had to be calculated on the basis of reduced pension entitlements, and the remainder on the basis of full pension entitlements. In January 1994, the lump-sum payment was recalculated by the Styria Regional Education Board on the basis of the criteria laid down by the Supreme Administrative Court, and raised to AS 500,612.

2.7 Not satisfied with this solution, the author filed a complaint with the European Commission of Human Rights.[95] By decision of 9 January 1995, the European Commission held that the author's application concerned essentially the same issues as his previous communication under the Optional Protocol to the Human Rights Committee, namely discrimination, both in as much as his claim to a widower's pension and the applicability of the transitional provisions of the Eighth Amendment to his pension entitlements was concerned. The Commission concluded that the "same matter" had already been submitted to (and decided by) another procedure of international investigation or settlement, and dismissed the author's application pursuant to article 27, paragraph 1*(b)*, of the European Convention on Human Rights and Fundamental Freedoms.

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[94] Communication No. 415/1990.

[95] Application No. 24872/94.

2.8 On the requirement of exhaustion of domestic remedies, the author explains that he did not apply to the Constitutional Court for redress, because he considered that such an action would inevitably fail in the light of the Constitutional Court's decision on essentially the same matter of 3 October 1989. He therefore submits that all available domestic remedies have been exhausted.

2.9 As to the reservation to article 5, paragraph 2(a) , of the Optional Protocol entered by Austria upon ratification of the Protocol, pursuant to which the Committee is precluded from considering a communication if the same matter has been examined by the European Commission on Human Rights, Mr. Pauger contends that his case was declared inadmissible on the ground that the Commission considered that it lacked competence to examine the matter, and that in contrast to other cases, the alleged violations of the European Convention were not even considered by the Commission. He argues that the Commission's decision to declare his case inadmissible cannot be regarded as an "examination" of the "same matter", within the meaning of the reservation to article 5, paragraph 2(a), of the Optional Protocol entered by Austria, and that the Human Rights Committee is not precluded from considering his case.

The complaint

3. It is submitted that the lump-sum payment of AS 500,612 finally awarded by the Styria Regional Education Board is AS 133, 976 less than would be a lump-sum payment calculated on the basis of full pension entitlements a widow would be able to claim. The author contends that this constitutes sex-based discrimination against him, in violation of article 26 of the Covenant.

State party's observations on admissibility and author's comments

4.1 By a submission of 11 October 1996, the State party invokes its reservation to article 5, paragraph 2(a), of the Optional Protocol, pursuant to which the Committee may only consider a communication if it has ascertained that the same matter has not been examined by the European Commission of Human Rights. In the instant case, it is said to be clear that the European Commission was seized of the "same matter".

4.2 The State party rejects the author's view that since the European Commission did not deal with the merits of his claim and declared his case inadmissible on the ground that the Human Rights Committee had already examined the "same matter", the complaint had not been "examined" and that the reservation accordingly does not apply. The State party explains that "the purpose of the reservation is to ensure that where the European Commission has been seized of a matter, whatever the Commission's decision may have been, the UN Human Rights Committee cannot be seized of the same matter. The reasons why the reservation was entered were (a) to avoid subjecting the European Commission to review by another international organ and (b) to avoid the emergence of diverging case-law of different international organs. These aims of the reservation refer to all types of decisions issued by the European Commission".

4.3 It is noted that in its January 1995 decision, the European Commission examined the case with reference to the Human Rights Committee's Views of 30 March 1992 and found that the author's communication to the Human Rights Committee and his case before the Commission essentially concerned the same issue. Austria therefore concludes that the reservation to article 5, paragraph 2(a), of the Optional Protocol applies, and that the Committee has no jurisdiction to consider the present case.

4.4 Subsidiarily, the State party argues that the case constitutes an abuse of the right of submission within the meaning of article 3 of the Optional Protocol: the legal issue is the same as that in two previous cases examined by two international instances of investigation or settlement and has already been settled.

5.1 In his comments, the author considers that the Committee's Views of March 1992 only decided his case up to that moment in time and did not give the State party a right to violate his rights under the Covenant thereafter. Therefore, it must be admissible to introduce a new communication alleging sex-based discrimination since March 1992. And if this (new) complaint is deemed inadmissible under the European Convention of Human Rights by the European Commission, then the Human Rights Committee should be allowed to consider the complaint - otherwise, _no_ international instance would be competent. Mr. Pauger thus contends that his communication should be deemed admissible.

5.2 The author further argues that the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol does not apply in his case, because the European Commission merely declared his complaint inadmissible, without examining the merits of his claims. To his mind, the aims of the Austrian reservation advanced by the State party - to avoid subjecting the European Commission to review by another international body and to avoid the emergence of diverging case-law of different international bodies - would not be contradicted if the Human Rights Committee declared his complaint admissible.

5.3 According to the author, the European Commission's _ratio decidendi_ of 9 January 1995 has no relevance to his case before the Committee. He further disagrees with the Commission's opinion that the present communication concerns the "same matter" as that already examined by the Committee in the Views of March 1992, given that the present communication is based on facts which occurred _since_ that date.

5.4 The author refutes the contention that his complaint is an abuse of the right of submission. Rather, he argues, it is the State party which has abused its authority, since it took no measures to remedy the violation of article 26 found by the Committee. On the contrary, some Government officials publicly disavowed the Committee's Views, which makes it necessary, in the author's opinion, to examine the matter once again.

Committee's decision on admissibility

6.1 At its 60th session, the Committee considered the admissibility of the communication.

6.2 The Committee noted the author's argument that a further complaint to the Constitutional Court of Austria would be futile in his situation, as the Constitutional Court had already adjudicated on basically the same issue in its judgment of 3 October 1989. The State party had not challenged the author's argument in this respect. The Committee concluded that the requirements of article 5, paragraph 2(b), of the Optional Protocol had been met.

6.3 With respect to the author's claim under article 26, the Committee noted that the author's complaint submitted to the European Commission on Human Rights was based on the same events and facts as the complaint he now submitted under the Optional Protocol. It recalled that in respect of article 5, paragraph 2(a), of the Optional Protocol, Austria entered the following reservation upon ratification: "The Republic of Austria ratifies the Optional Protocol ... on the understanding that, further to the provisions of article 5(2) of the Protocol, the Committee ...

shall not consider any communication from an individual unless it has ascertained that the same matter has not been examined by the European Commission of Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms".

6.4 In the instant case, the Committee was seized of the "same matter" as the European Commission had been. As to whether the European Commission had "examined" the matter, the Committee began by noting that the Commission declared the author's complaint inadmissible on the basis of article 27, paragraph 1(b), of the European Convention, because it considered in turn to be seized of the "same matter" as had been before the Human Rights Committee in the author's first complaint to the Committee (communication No. 415/1990). The Committee observed that the European Commission had declared the author's application inadmissible on procedural grounds, without examining in any way the merits of the author's claim. In so doing, it had acknowledged that there were some differences in the author's first application to the Human Rights Committee and his subsequent application to the European Commission, but that the two cases concerned "essentially the same issue". On this basis, the Committee considered that the European Commission did not "examine" the author's complaint, since it declared it inadmissible on procedural grounds, which related to the earlier examination of the same issue by the Human Rights Committee.

6.5 In the light of the above considerations, the Committee was of the opinion that it was not precluded by the Austrian reservation to article 5, paragraph 2(a), of the Optional Protocol, from considering the present communication.

7. On 9 July 1997, the Human Rights Committee therefore decided that the communication was admissible in so far as it appeared to raise issues under article 26 of the Covenant.

State party's submission on the merits and author's comments

8. By submission of 19 February 1998, the State party submits that the legal rules originally relevant to the author's case were transitional provisions which have ceased to be operative, so that by now the equal status of widows and widowers in the provisions of Austrian pension law applicable to the author's case is fully established.

9. In his comments, the author states that the State party's submission has no relevance to his complaint. Furthermore, he challenges the State party's submission as factually incorrect, since equal treatment only exists for those pensions that have their origin in a date after 1 January 1995. For pensions originating before, unequal treatment continues according to the author, since the Constitutional Court has allowed a more beneficiary pension for women on the basis of legitimate expectation.

Examination of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is whether the basis of calculation of the lump-sum payment which the author received under the Pension Act is discriminatory. The lump-sum payment, consisting of 70 monthly instalments, was calculated partly, i.e. until 31 December 1994, on the basis of the reduced pension. The Committee upholds its views concerning communication No. 415/1990, that these reduced pension benefits for widowers are discriminatory on the ground of sex. Consequently, the reduced lump-sum payment received by the author is likewise in violation of article 26 of the Covenant, since the author was denied a full payment on equal footing with widows.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Pauger with an effective remedy, and in particular to provide him with a lump-sum payment calculated on the basis of full pension benefits, without discrimination. The State party is under an obligation to take measures to prevent similar violations.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Z. Communication No. 719/1996, Levy v. Jamaica (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Conroy Levy (represented by Simons Muirhead and Burton, a law firm in London)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	17 May 1996 (initial submission)
Date of decision on admissibility:	3 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No.719/1996 submitted to the Human Rights Committee by Mr. Conroy Levy, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Conroy Levy, a Jamaican citizen currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 6; 7; 10, paragraph 1 and 14, paragraph 3 (b) and (d), of the International Covenant on Civil and Political Rights. He is represented by Mr. Saul Lehrfreund of the London law firm Simons Muirhead Burton.

The facts as submitted by the author

2.1 On 16 October 1990, the author was arrested and charged with the murder of one Philip Dussard. On 8 April 1992, he was found guilty as charged and sentenced to death by the Home Circuit Court in Kingston. On 13 June 1994, the Court of Appeal of Jamaica dismissed his appeal and classified the author's offence as capital murder under Section 2 of the Offences Against the Person (Amendment) Act 1992. On 22 June 1995, a petition was lodged with the Judicial Committee of the Privy Council for special leave to appeal against the re-classification of the author's offence, on the ground that the Court of Appeal had no jurisdiction to perform the classification at the conclusion of an appeal where the appeal against the conviction had been dismissed. However, the Registrar of the Privy Council would not list the petition for hearing, but instead awaited the outcome of the appeal of Leroy Morgan and Samuel Williams, in which a similar issue had been granted leave to appeal. On 7 March 1996, the Judicial Committee of the Privy Council delivered its judgement in the case of Morgan & Williams. It allowed the appeal and quashed the classifications of the Court of Appeal as having been made with out jurisdiction, and declared them null and void. Consequently, the classification of Mr. Levy's offence was also null and void, and the process of classification had to be restarted in accordance with section 7 of the Offences Against the Person (Amendment) Act 1992, which requires that review is first to be performed by a single judge of the Court of Appeal and then, if appealed, by three designated judges, and not by the Court of Appeal as such. In the author's case, his offence was classified as capital by a single judge in June of 1996 and, on appeal, by three judges on 19 November 1996.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 On the issue of exhaustion of domestic remedies, counsel explains that the author has not applied to the Supreme (Constitutional) Court of Jamaica for redress. It is argued that a constitutional motion in the Supreme Court would inevitably fail, in light of the judicial precedent set by the Judicial Committee of the Privy Council in Huntley v. Attorney General for Jamaica (1995) 1 ALL ER 308. It is further submitted that if it is considered that the author does have a constitutional remedy in theory, in practice it is not available to him because of lack of funds and the unavailability of legal aid. Reference is made to findings of the Committee[96] that in the absence of legal aid a constitutional motion does not constitute an available remedy. With this, it is submitted, domestic remedies have been exhausted.

The complaint

3.1 Counsel contends that the process of reclassification for capital murder violated article 14, paragraphs 1 and 3, of the Covenant. Counsel states that the Offences Against the Person (Amendment) Act 1992 creates two categories of murder, namely capital and non-capital murder. Section 7 of the Act provides for the classification of convictions pronounced prior to the entry into force of the Act as capital or non-capital murder. Murder is to be classified as capital if it is committed, inter alia, in the course of robbery, burglary, or house-breaking. Counsel argues that Section 7 requires a further finding of aggravating factors which were not considered during the original trial. It is submitted that the reclassification amounts to a "determination of a new criminal charges" against the author, within the meaning of article 14 of the Covenant. Alternatively, it is argued that the reclassification is, in fact, an extension of the original sentencing process and should, therefore, qualify for the procedural safeguards of article 14 which normally apply at the sentencing stage. Specifically, it is argued that article 14 was violated at the time of the initial classification by the single judge as

- the author was not notified of the grounds on which the single judge might decide the classification;

- he was not entitled to legal representation;

- the proceedings were not public.

3.2 Counsel alleges a violation of article 14, paragraph 3(b) and 3(d), on the grounds that (1) the author was not represented by counsel at his preliminary hearing and (2) the author did not meet the legal aid trial lawyer before the day of the trial, and consequently he was not able to give him instructions, including informing the lawyer of witnesses he wanted to be called in his defence, and for this reason the author remained silent throughout the trial. As to the latter ground, it is further alleged that the author wanted the trial to be set for another date, but that his lawyer refused to request an adjournment.

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[96] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

3.3 Counsel alleges that, as a consequence of the alleged violation of article 14, also article 6, paragraph 2, was violated by the imposition of the death sentence, as the provisions of the Covenant were breached, and no further appeal is now possible. Reference is made to the Committee's jurisprudence.[97]

3.4 Counsel alleges that the author's rights under article 7 and 10 of the Covenant were violated after his arrest, because of the police authorities' failure to take account of the author's injured condition and to make proper arrangements for his medical treatment. Counsel states that the author suffered a gunshot wound two days prior to his arrest. In a letter to counsel, the author states that he was knocked unconscious by the bullet which had entered the left side of his face "and mash up my tooth and shift my tonsil to the left side ... my jaw bone was broken also". The author further states that four hours after being shot he was taken first to the Spanish Town Hospital and then to Kingston Public Hospital, where he was put on a drip and given medication. After four days, he was taken to the Hunts Bay Police Station where he remained for seven days. The author claims that during this week he received no medication and that his request to see a doctor was declined. Furthermore, the author states that at Hunts Bay Police Station he was kept, in a sick state, in a cell measuring approximately 8' x 10' with nine other prisoners, that there was no lighting, and that he was forced to sleep on the floor which was "filthy with water running through the cell". The lack of proper care is also said to be in violation of the U.N. Standard Minimum Rules fo the Treatment of Prisoners.

3.5 Counsel also alleges a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of incarceration at St. Catherine's District Prison. Counsel invokes several reports of non-governmental organisations concerning the inhuman conditions of detention at St. Catherine District Prison. In this context, it is submitted that the author spends twenty-three hours of each day in a cell with no mattress, other bedding or furniture, no sanitation, no natural light and with inadequate ventilation. Furthermore, the author claims that the injuries which were inflicted on him by the gun shot prior to his arrest have not yet healed, and that he has been denied proper treatment. It is stated that he should have had an operation on his throat and jaw in April 1995, but that the prison authorities "failed to meet my appointment irrespective of the fact that I am constantly complaining of the swelling in my throat ... I find it very difficult to swallow hard food". Counsel further states that the author has been advised by a doctor that unless he has an operation his medical condition will not improve. The prison itself is in a total state of disrepair, the provision of food is not palatable and does not meet the author's nutrition needs and medical assistance is lacking. The conditions under which the author is detained are said to amount to a violation of article 7 and 10 of the Covenant, as well as Sections 10; 11 (a) and (b); 12; 13; 15; 19; 22 (1), (2), (3); 24; 25 (1) and (2); 26 (1); 35 (1); 36 (1), (2), (3), (4); 57; 71 (2); 72 (3); and 77 of the U.N. Standard Minimum Rules for the Treatment of Prisoners.

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[97] Communications Nos. 464/1991 and 482/1991 (Garfield Peart and Andrew Peart v. Jamaica), Views adopted on 19 July 1995.

3.6 Counsel further alleges a violation of articles 7 and 10, paragraph 1, of the Covenant as the author has been awaiting execution for over five years on death row. It is submitted that the "agony of suspense" resulting from such long awaited and expected execution of the death sentence amounts to cruel, inhuman and degrading treatment, as recognised by the Judicial Committee of the Privy Council in Pratt and Morgan v. The Attorney General of Jamaica[98] and in Guerra v. Baptiste & Others.[99]

State party's submission and counsel's comments thereon

4.1 In its submission of 1 November 1996, the State party notes that the author has not exhausted domestic remedies as he did not petition the Judicial Committee of the Privy Council, but recognises that the author's petition would have been based on an issue which was decided in Morgan & Williams v. R, which at the time was pending before the Judicial Committee of the Privy Council, and the State party therefore will not take the point that the author has not exhausted domestic remedies.

4.2 In the remaining part of its submission, the State party addresses the merits of the complaint. As to the alleged violation of article 14 in the single judge's reclassification of the author's offence, the State party denies that this exercise is a "determination of a criminal charge" to which the article 14 guarantees apply. Furthermore, the State party points out that there is a right to appeal the decision of the single judge and that the fair trial guarantees are applicable in the appeal proceedings before the three judge-panel. The State party explains that the grant of these guarantees at the appeal stage are in the interest of justice, not on the basis that the review constitutes a determination of a criminal charge.

4.3 As to the alleged violation of article 14, paragraph 3(b), on the ground that the author was without representation in the preliminary hearing, the State party submits that it was open for the author to apply for legal aid for this hearing. The State party argues that unless it can be shown that agents of the state prevented the author from exercising his right, then it is not responsible for the lack of representation. With regard to the alleged violation of the same provision on the ground that the author only met his trial lawyer on the first day of the trial, which allegedly prevented the obtaining of a witness for the defence, the State party notes that counsel who conducted the appeal was unable to locate the witness despite several attempts. Further, the State party denies that the manner in which legal aid counsel conducted the case is a matter which can be attributed to the State. In conclusion, the State party submits that the circumstances do not disclose any breach of the Covenant which the State party can be held responsible for.

4.4 With regard to the alleged violation of articles 7 and 10, paragraph 1, on the ground of lack of medical attention and the conditions of detention at Hunts Bay Police Station, the State party denies that there is any evidence that the author was in as poor a condition as he claims and that he was denied medical attention. The State party argues that given the level of injury which the author alleges that he sustained, it is difficult to appreciate how the author could continue without deteriorating to the point where hospitalization would become essential if he were to survive without being seriously impaired beyond the point now being alleged.

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[98] Judgement PC Appeal No. 10 of 1993, delivered on 2 November 1993.

[99] (1995) 4 ALL ER.

4.5 With respect to the author's treatment in prison, the State party states that it will make inquiries into the allegation that the author was denied opportunity to have surgery.

4.6 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of "agony of suspense" suffered by the author due to the delay of execution, the State party submits that a prolonged stay on death row does not per se constitute cruel and inhuman treatment.

5.1 In his submission of 9 January 1997, counsel reiterates that the provisions of article 14 of the Covenant were breached in the single judge's reclassification of the author's offence in June 1996 as this in itself was a determination of the criminal charge. It is argued that, as the sentence determined at the trial no longer provided authority for his execution, the author was being charged with capital murder effectively for the first time at the reclassification. In this regard, counsel points out that an additional finding had to be made by the single judge performing the reclassification, namely that the offence was one of aggravated or capital murder. Alternatively, if it is not accepted that the reclassification amounts to the determination of a criminal charge, it is submitted that the process of drawing inferences from the evidence at trial was in effect an extension of the original trial process and that the safeguards in article 14 therefore must apply in accordance with the general principle that "due process requirements applied at the conviction stage, extend to the sentencing process as well". With reference to the State party's note that procedural safeguards apply at the appeal stage of the reclassification procedure, i.e. before the three judge-panel, and that these safeguards are granted in the interest of justice, counsel argues that the interest of justice also requires that the safeguards apply at the previous stage where the single judge makes his determination.

5.2 With reference to the allegations of violations of article 14, paragraph 3(b) and 3(d), counsel reiterates that the author, in breach of the Covenant, was not represented at the preliminary hearing, that the author only met his attorney for the first time on the day of the trial, and that the trial lawyer refused to apply for an adjournment in spite of the author's request. It is submitted that the author was denied an effective opportunity to engage and communicate with his attorney, and that the preparation for the defence therefore was inadequate.

5.3 As to the alleged violations of articles 7 and 10, paragraph 1, on the grounds of lack of medical attention and conditions of detention at Hunts Bay Police Station and St. Catherine's District Prison, and on the ground of prolonged stay on death row, counsel reiterates his previous claims and allegations.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party explicitly waives the right to invoke non-exhaustion of domestic remedies and that the State party in its submission has addressed the merits of the communication. This enables the Committee to consider both the admissibility and the merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 As to the author's claim that, in violation of article 14, paragraph 3(b) and 3(d), he only met his lawyer on the day of the trial, and that he therefore had no time to prepare his defence properly, including giving counsel instructions as to witnesses he wanted to be called in his defence, the Committee notes that the trial transcripts show, as opposed to what was explicitly stated by counsel, that the author's legal aid counsel at the trial in fact asked for and was granted an adjournment for two days, in order to interview two possible witnesses of whom he knew the identity. In these circumstances, the Committee finds this claim inadmissible as an abuse of the right to submission, under article 3 of the Optional Protocol.

6.4 The author claims that after his arrest, in violation of articles 7 and 10, paragraph 1, of the Covenant, he was denied medical attention while being detained at Hunts Bay Police Station, and that he was kept in inadequate conditions while in a very poor physical condition. The Committee notes the State party's rebuttal of the allegation, and notes also that the author has not brought these allegations to the attention of his trial lawyer, the courts or any other authority prior to his complaint to the Committee, nor has he forwarded any other evidence for his allegations. The Committee finds that the author has failed to substantiate his claim and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 The author claims to be a victim of violations of articles 7 and 10, paragraph 1, also on two additional grounds. Concerning the claim that his detention on death row since 1992 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence[100] that detention on death row for any specific period of time does not constitute a violation of articles 7 and 10, paragraph 1, of the Covenant in absence of further compelling circumstances. The Committee has in its jurisprudence[101] held that deplorable conditions of detention may on their own constitute a violation of articles 7 and 10 of the Covenant, but they cannot be regarded as "further compelling circumstances" in relation to the "death row phenomenon". Consequently, no relevant circumstances have been adduced by counsel or the author, and the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol. On the other hand, the author's claims of violations of the same provisions on the ground of lack of medical treatment and conditions of detention in St. Catherine's District Prison are, in the view of the Committee, sufficiently substantiated to be considered on the merits, and are therefore deemed admissible.

6.6 The Committee also declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 As to the author's claim that the reclassification of his offence as capital murder by the single judge violated article 14, the Committee notes that pursuant to the Offences against the Persons (Amendment) Act 1992, the State party adopted a procedure to reclassify established murder convictions expeditiously by entrusting the initial review of each case to a single judge, enabling him to promptly give a decision in favour of a prisoner who in his opinion had committed a non-capital offence, and thus removing rapidly any uncertainty as to whether he was still at risk of being executed. If the single judge on the other hand found that the offence was of capital nature, the convict was notified and was granted the right to appeal the decision to a three judge-panel, which would address the matter in a public hearing. The Committee notes that it is not disputed that all procedural safeguards contained in article 14 applied in the proceedings before the three judge-panel. The author's complaint is solely directed at the first stage of the reclassification procedure, i.e. the single judge's handling of the matter, of which the author was not notified and in which there was no public hearing where the author could comment on the relevant issues or be represented. The Committee is of the opinion that the reclassification of an offence for a convict already subject to a death sentence is not a "determination of a criminal charge" within the meaning of article 14 of the Covenant, and consequently the provisions in article 14, paragraph 3, do not apply. The Committee considers, however, that the safeguards contained in article 14, paragraph 1, should apply also to the reclassification procedure. In this regard, the Committee notes that the system for reclassification allowed the convicts a fair and public hearing by the three judge-panel. The fact that this hearing was preceded by a screening exercise performed by a single judge in order to expedite the reclassification, does not constitute a violation of article 14.

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[100] See, inter alia, the Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996.

[101] See, inter alia, the Committee's Views on communication No. 705/1996 (Desmond Taylor v. Jamaica), adopted on 2 April 1998.

7.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented in the preliminary hearing that was held prior to the trial. In its jurisprudence,[102] the Committee has held that the requirement that legal assistance must be made available to an accused faced with a capital crime applies not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case. In the present case, the Committee notes that it is not disputed that the author was unrepresented at the preliminary hearing, and, notwithstanding the State party's contention that it can not be held responsible for the lack of representation as it was open for the author to apply for legal aid, it finds that the facts disclose a violation of article 14, paragraph 3(d). As previously held by the Committee,[103] it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings.

7.3 With regard to the author's claim to be a victim of article 6, paragraph 2, of the Covenant, the Committee notes its General Comment 6[16], where it held that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review of the conviction and sentence by a higher tribunal". In the present case, the preliminary hearing was conducted without meeting the requirements of article 14, and as a consequence the Committee finds that also article 6, paragraph 2, was violated as the death sentence was imposed upon conclusion of a procedure in which the provisions of the Covenant were not respected.

7.4 As to the allegation of a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the author has made specific allegations. He states that he is detained twenty-three hours a day in a cell with no mattress, other bedding or furniture, that the cell has no natural light and inadequate sanitation, and that the food is not palatable. Furthermore, he states that there in general is a lack of medical assistance, and specifically he mentions that he in April 1995 should have had an operation on his jaw and throat, but that the prison authorities made it impossible for him to keep his appointment. The State party has not refuted these specific allegations, and has not forwarded results of the announced investigation into the author's allegations that he was denied opportunity to have an operation in April 1995. The Committee finds that these circumstances disclose a violation of article 10, paragraph 1, of the Covenant.

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[102] See the Committee's Views on communication No. 459/1991 (Osbourne Wright and Eric Harvey v. Jamaica), adopted on 27 October 1995.

[103] See, inter alia, the Committee's Views on communication No. 223/1987 (Frank Robinson v. Jamaica), adopted on 30 March 1989.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 10, paragraph 1, article 14, paragraph 3(d), and consequently, article 6, paragraph 2.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Levy with an effective remedy, including commutation and compensation.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

AA. Communication No. 720/1996, Morgan and Williams v. Jamaica (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Leroy Morgan and Samuel Williams (represented by Simons Muirhead and Burton, a law firm in London)
Alleged victims:	The authors
State party:	Jamaica
Date of communication:	19 April 1995 (initial submission)
Prior decision:	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 2 September 1996
Date of decision on admissibility:	3 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No.720/1996 submitted to the Human Rights Committee by Messrs. Leroy Morgan and Samuel Williams, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Leroy Morgan and Samuel Williams, Jamaican citizens currently awaiting execution at St. Catherine District Prison, Jamaica. They claim to be victims of violations by Jamaica of articles 6; 7; 10, paragraph 1, and 14, paragraph 3 (b) and (d) of the International Covenant on Civil and Political Rights. They are represented by counsel. Mr. Saul Lehrfreund of the London law firm of Simons Muirhead & Burton.

The facts as presented by the authors

2.1 On 12 April 1991, the authors were convicted for the murder of George Chambers and sentenced to death. On 16 November 1992, the Court of Appeal of Jamaica dismissed their appeal and classified the authors' offences as capital murder under

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

Section 2 of the Offences Against the Person (Amendment) Act 1992. On 15 March 1995, a petition was lodged with the Judicial Committee of the Privy Council for special leave to appeal against their convictions and the reclassification of their offences. Special leave to appeal was granted limited to the "issue of the substitution by the Court of Appeal of a verdict of guilty of capital murder". On 7 March 1996, the Judicial Committee of the Privy Council held that the Court of Appeal as such has no jurisdiction to perform the reclassification for capital murder. Consequently, the classification of the Court of Appeal in the authors' case was found null and void. The process of classification was subsequently restarted in accordance with section 7 of the Offences Against the Person (Amendment) Act 1992, which requires that review is first to be performed by a single judge of the Court of Appeal and then, if appealed, by three designated judges, and not by the Court of Appeal as such. In the authors' case, their offences were classified as capital by a single judge on 26 July 1996 and, on appeal, by three judges on 18 November 1996.

2.2 As to the reclassification of the case, which was made in accordance with the Statute, it is submitted that a petition for special leave to appeal to the Privy Council is not available and effective. Reference is made to findings of the Privy Council in Walker v. The Queen (1995) 2 AC 36. Counsel explains that under its Statutes, the Judicial Committee of the Privy Council is not in a position to review a decision of the judges of the Court of Appeal of Jamaica sitting as an administrative body.

2.3 The authors have not applied to the Supreme (Constitutional) Court of Jamaica for redress. It is argued that a constitutional motion in the Supreme Court would inevitably fail, in light of the precedent set up by the Judicial Committee of the Privy Council in Huntley v. Attorney General for Jamaica (1995) 1 ALL ER 308. It is further submitted that if it is considered that the authors have a constitutional remedy in theory, in practice it would not be available to them because of lack of funds and the unavailability of legal aid. Reference is made to findings of the Committee[104] that in the absence of legal aid, a constitutional motion does not constitute an available remedy. With this, it is submitted, domestic remedies have been exhausted.

The complaint

3.1 Counsel contends that the process of reclassification for capital murder was in violation of articles 14, paragraphs 1 and 3, of the Covenant. Counsel states that the Offences Against the Person (Amendment) Act 1992 creates two categories of murder; capital and non-capital. Section 7 of the Act provides for the classification of convictions that were pronounced prior to the entry into force of the Act. Murder is to be classified as capital if it is committed, inter alia, in the course of robbery, burglary, or house-breaking. Counsel notes that Section 7 requires a further finding of aggravating factors which were not considered during the original trial. It is submitted that the reclassification amounts to the determination of new criminal charges against the authors, within the meaning of article 14 of the Covenant. Alternatively, it is argued that the reclassification is in fact an extension of the original sentencing process and should qualify for the procedural safeguards of article 14 which apply at the sentencing stage. Specifically it is argued that article 14 was violated at the time of the initial classification by the single judge, as

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[104] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

- the authors were not given any notice of where or how their cases were reviewed

- the authors were not given any notice of the statutory category under which their offences might be considered capital

- the authors were not provided with a copy of the reasons for the decision of the judge

- the authors were not given the opportunity to be heard in person or to make written representations

- the authors were not given an opportunity to be represented by a legal representative

- the authors were not informed of the factual findings upon which the judge was minded to make the classification

- the proceedings in which the decision was made were not held or conducted in public.

3.2 Counsel alleges that, as a consequence of the alleged violation of article 14, also article 6, paragraph 2, was violated by the imposition of the death sentence, as the provisions of the Covenant were breached, and no further appeal is now possible. Reference is made to the Committee's jurisprudence.[105]

3.3 Counsel alleges a violation of articles 7 and 10, paragraph 1, on the ground of the conditions of detention at St. Catherine's District Prison. Counsel invokes the reports of non-governmental organizations concerning the inhuman conditions of detention at St. Catherine District Prison. In this context, it is submitted that the authors spend twenty-three hours a day in a cell with no mattress, other bedding or furniture, no sanitation, no natural light and inadequate ventilation. The prison itself is in a total state of disrepair, the quality of food is very poor and medical assistance is lacking. The conditions under which the authors are detained are said to amount to a violation of article 7 and 10 of the Covenant, as well as Sections 10; 11 (a) and (b); 12; 13; 15; 19; 22 (1), (2), (3); 24; 25 (1) and (2); 26 (1); 35 (1); 36 (1), (2), (3), (4); 57; 71 (2); 72 (3); and 77 of the U. N. Standard Minimum Rules for the Treatment of Prisoners.

3.4 With regard only to Leroy Morgan, counsel alleges a violation of articles 7 and 10, paragraph 1, because at the time of the commencement of his detention at St. Catherine's District Prison he was denied medical attention to injuries he sustained after a gun shot in 1987. It is submitted that Mr. Morgan contacted the Superintendent of St. Catherine's District Prison on numerous occasions requesting that he be provided with medical treatment for his injury which was causing him extreme pain, but that he never received medical treatment, despite promises from the Superintendent. The lack of proper medical care is also said to be in violation of the U. N. Standard Minimum rules for the Treatment of Prisoners.

3.5 Counsel alleges a violation of articles 7 and 10, paragraph 1, also on the ground that the authors have been awaiting execution since 1992 on death row. It is submitted that the "agony of suspense" amounts to cruel, inhuman and degrading treatment, as recognized by the Judicial Committee of the Privy Council in the cases of Pratt and Morgan v. The Attorney General of Jamaica[106] and Guerra v. Baptiste & Others.[107]

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[105] Communications Nos. 464/1991 and 482/1991 (Garfield Peart and Andrew Peart v. Jamaica), Views adopted on 19 July 1995.

State party's submission and counsel's comments thereon

4.1 In its submission of 4 November 1996, the State party, in the interest of expediting the examination of this communication, states that it will address both the admissibility and the merits, but it does not explicitly contest the admissibility of the communication.

4.2 As to the alleged violation of article 14, paragraphs 1 and 3, in the reclassification of the authors' offences, the State party denies that there has been any breach of the Covenant. The State party explains that before the entry into force of the Amendment Act in October 1992 the penalty for murder was an automatic death sentence, and that everyone who at the time already was sentenced to death were given a second chance through the retroactive application of the Act. This operated as a review process where a single judge would make a preliminary determination of capital or non-capital murder. The State party states that the factors which affect the judge's decision are the clear and unambiguous categories of Offences set out in the Act and the trial transcript, both of which were available to the author and his counsel. Prior to this review, it is stated, a jury found the authors guilty of murder beyond a reasonable doubt, and the jury must have been satisfied that the offence not just had been committed, but also that it was committed in the manner alleged by the prosecution. Further, the State party states that the case, including the judge's directions to the jury and addresses, was reviewed on appeal, and therefore, the evidence used by the single judge to make his decision had already been examined twice before it came to him. Furthermore, the State party argues that the procedure allows that if for some reason the single judge went beyond the evidence in the transcript and made a classification of capital murder, then this could be dealt with by counsel before the panel of three judges, i.e. the author was given an opportunity, complete with legal representation, to challenge the single judge's decision. In conclusion, the State party holds that both the reclassification in this particular case and the reclassification procedure at large is consistent with the Covenant, not a violation thereof.

4.3 The State party states that it will make inquiries into Leroy Morgan's allegation of lack of medical treatment in St. Catherine's District Prison.

4.4 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of "agony of suspense" suffered by the author due to the delay of execution, the State party submits that a prolonged stay on death row does not per se constitute cruel and inhuman treatment.

5.1 In his submission of 10 January 1997, counsel comments on the State party's submission. Regarding the alleged violation of article 14, counsel argues that the factors which influence the single judge's decision, contrary to the State party's observations, are far from clear and that a number of categories of offences set out in the Amendment Act are ambiguous. In this respect, counsel points out that appeals have already been heard by the Judicial Committee of the Privy Council on the issue of proper categorisation under the Amendment Act[108]. As to the State party's contention that the authors were among those who benefited from the retroactive application of the Amendment Act, and that they thus were given a second chance by an Act of Parliament, counsel argues that although the purpose of the Amendment Act is consistent with one of the purposes of the Covenant as it was given in order to reduce the categories of murder which attract the death penalty, the issue at hand is whether the mechanism for determining if aggravating factors under the Act are present is compatible with the guarantees in article 14 of the Covenant. In this regard, it is submitted that article 14 was breached by the single judge's reclassification of the authors' offences.

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[106] Judgement PC Appeal No. 10 of 1993, delivered on 2 November 1993.

[107] (1995) 4 ALL ER.

5.2 As to the alleged violations of article 7 and 10, paragraph 1, on the ground of prolonged stay on death row, counsel makes reference to the Committees's jurisprudence where it has held that prolonged detention on death row may breach the Covenant where further compelling circumstances are substantiated, and submits that the physical and psychological treatment of the prisoner, as well as their health, must be taken into consideration. Reference is also made to the individual opinions of five Committee members in communication No. 588/1994,[109] expressing the necessity of a case by case appreciation when determining whether prolonged stay on death row constitutes a violation of the Covenant.

5.3 As to the remaining allegations, counsel reiterates the claims put forward in the original submission.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the claim that the authors' detention on death row since 1991 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence[110] that detention on death row for any specific period of time does not constitute a violation of articles 7 and 10, paragraph 1, of the Covenant in absence of further compelling circumstances. The Committee has in its jurisprudence[111] held that deplorable conditions of detention may on their own constitute a violation of articles 7 and 10 of the Covenant, but they cannot be regarded as "further compelling circumstances" in relation to the "death row phenomenon". Consequently, no relevant circumstances have been adduced by counsel or the author, and the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol. On the other hand, the authors' claims of violations of the same provisions on the ground of lack of medical treatment and conditions of detention in St. Catherine's District Prison are, in the view of the Committee, sufficiently substantiated to be considered on the merits, and are therefore deemed admissible.

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[108] Reference is made to Leroy Lamey v. The Queen [1996] 1 WLR 902 and Simpson v. The Queen [1996] 2 WLR 77.

[109] Errol Johnson v. Jamaica, Views adopted on 22 March 1996.

[110] See, inter alia, the Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996.

[111] See, inter alia, the Committee's Views on communication No. 705/1996 (Desmond Taylor v. Jamaica), adopted on 2 April 1998.

6.4 The Committee also declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 As to the author's claim that the reclassification of his offence as capital murder by the single judge violated article 14, the Committee notes that pursuant to the Offences against the Persons (Amendment) Act 1992, the State party adopted a procedure to reclassify established murder convictions expeditiously by entrusting the initial review of each case to a single judge, enabling him to promptly give a decision in favour of a prisoner who in his opinion had committed a non-capital offence, and thus removing rapidly any uncertainty as to whether he was still at risk of being executed. If the single judge on the other hand found that the offence was of capital nature, the convict was notified and was granted the right to appeal the decision to a three judge-panel, which would address the matter in a public hearing. The Committee notes that it is not disputed that all procedural safeguards contained in article 14 applied in the proceedings before the three judge-panel. The author's complaint is solely directed at the first stage of the reclassification procedure, i.e. the single judge's handling of the matter, of which the author was not notified and in which there was no public hearing where the author could comment on the relevant issues or be represented. The Committee is of the opinion that the reclassification of an offence for a convict already subject to a death sentence is not a "determination of a criminal charge" within the meaning of article 14 of the Covenant, and consequently the provisions in article 14, paragraph 3, do not apply. The Committee considers, however, that the safeguards contained in article 14, paragraph 1, should apply also to the reclassification procedure. In this regard, the Committee notes that the system for reclassification allowed the convicts a fair and public hearing by the three judge-panel. The fact that this hearing was preceded by a screening exercise performed by a single judge in order to expedite the reclassification, does not constitute a violation of article 14. Consequently, the Committee also finds that these facts do not constitute a violation of article 6, paragraph 2, of the Covenant.

7.2 As to the allegation of a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the authors have made specific allegations. They state that they are detained twenty-three hours a day in cells with no mattress, other bedding or furniture, that the cells have inadequate sanitation and no natural light, and that the food is not palatable. Furthermore, they state that there in general is a lack of medical assistance, and the author Leroy Morgan specifically mentions that at the time of the commencement of his detention, despite numerous requests to the Superintendent, he was denied medical attention to injuries he sustained after a gun shot in 1987. The State party has not refuted these specific allegations, and has not forwarded results of the announced investigation into the author's allegations that he was denied medical attention in 1991. The Committee finds that these circumstances disclose a violation of article 10, paragraph 1, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 10, paragraph 1.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, that should entail compensation. Having regard to the circumstances, the Committee also recommends commutation of the death penalty imposed on the authors.

10. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Nisuke Ando

(partly dissenting)

I am not in disagreement with the Committee's finding of a violation of article 10, paragraph 1, in this case so far as it concerns Mr. Leroy Morgan's allegation with respect to the State party's denial of medical attention in 1991. (See para. 7.2) However, I have a difficulty in agreeing with the Committee's finding of violations of article 10, paragraph 1, for the alleged facts that the authors "are detained twenty-three hours a day in cells with no mattress, other bedding of furniture, that the cells have inadequate sanitation and no natural light, and that the food is not palatable. Furthermore ... there in general is a lack of medical assistance". (See, also, para 7.2.) These allegations are based exclusively on the reports of nongovernmental organizations about the general conditions of detention at St. Catherine's District Prison, and while the authors' counsel invokes these reports, he/she fails to prove, in my view, how these general conditions did affect specific conditions of each of the authors. It may be true that the State party has not refuted the above-mentioned allegations, but it is the duty of the Committee to ascertain the validity of each allegation on the basis of facts which specifically support it. In this particular case I am afraid that the Committee has more to do to fulfil this duty.

(Signed) Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

BB. Communication No. 722/1996, Fraser and Fisher v. Jamaica (Views adopted on 31 March 1999, sixty-fifth session)*

Submitted by:	Anthony Fraser and Nyron Fisher (represented by David Stewart of the London law firm S. J. Berwin and Co.)
Alleged victims:	The authors
State party:	Jamaica
Date of communication:	7 August 1996
Date of decision on admissibility:	31 March 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1999,

Having concluded its consideration of communication No.722/1996 submitted to the Human Rights Committee by Messrs Anthony Fraser and Nyron Fisher under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Mr. Anthony Fraser, a Jamaican citizen born in 1957, and Mr. Nyron Fisher, a Jamaican citizen born in 1968. Both are imprisoned at General Penitentiary in Jamaica. They claim to be victims of violations by Jamaica of articles 7, 10 and 14, paragraphs 1 and 3 (b and d), of the International Covenant on Civil and Political Rights. They are represented by David Stewart of the London law firm S. J. Berwin & Co. In 1995, the authors' convictions were classified as non-capital pursuant to the Offenses Against the Person (Amendment) Act 1992, and their death sentences were commuted to life imprisonment with a non-parole period of 7 years.

The facts as submitted by the authors

2.1 The authors were convicted of the murder of one Rahalia Buchanan and sentenced to death on 19 December 1989 by the St. Thomas Circuit Court, Jamaica. Their appeal was dismissed on 18 May 1992 by the Court of Appeal. On 31 October 1994, their petitions for Special Leave to Appeal to the Privy Council were refused. It is contended by counsel that a constitutional remedy is not available in practice. Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, paragraph 2(b), of the Optional Protocol.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia.

2.2 Mr. Buchanan, a resident of New York but a former inhabitant of Jamaica, was murdered in the small village of Airy Castle in Jamaica on the night of 4 October 1988. The prosecution alleged that the deceased was killed during a lynching in which he, inter alia, was chopped with machetes. The prosecution's case relied on visual identification evidence of three eye witnesses, Ms. Thermutis McPherson, Mr. Harold Deans and Ms. Loretta Reid. The latter did not testify at the trial, but her deposition from the preliminary hearing was admitted into evidence and read to the court. All of these witnesses placed Mr. Fisher on the scene of the crime, and two of them claimed to have seen him chopping the deceased with a machete. Only one witness, Mr. Deans, claimed to have seen Mr. Fraser and alleged that also he had chopped the deceased with a machete. The authors were tried alongside five other defendants, of which four were acquitted.

The complaint

3.1 The authors claim to be victims of a violation of article 14, paragraph 1, submitting that because of the poor quality of and the inconsistencies in the prosecution's evidence, it could not warrant a conviction. It is stated that the lighting around the scene of the murder was weak as there was no electricity after hurricane Gilbert had hit the island just before. The only light came from two "bottle torches". It is also stated that the scene of the murder was extremely confused. Furthermore, counsel states that Annette Small, another witness, attested that Ms. McPherson was an accomplice to the murder, that she ran to fetch salt to rub into the deceased's wounds, and refused to fetch him water to drink. It is stated that the testimony of Annette Small contradicts that of Ms. McPherson who held that this was done by Mr. Fisher. Counsel claims that also the witness Mr. Deans was partial, as he bore a personal grudge to Mr. Fraser and because he himself had been arrested and detained for 10 days in connection with the same murder and therefore "had an interest in casting blame on others". Furthermore, counsel makes reference to an episode in Mr. Deans' testimony in which, as opposed to what he had held at the preliminary hearing, he claimed that he had seen the authors attacking the deceased before he entered a nearby shop, and not after. Counsel also points out the "irreconcilable inconsistency" between Ms. McPherson's testimony and that of Mr. Deans, as only the latter placed Mr. Fraser on the scene of the crime.

3.2 The authors also claim that their right to a fair trial, as provided for in article 14, was violated because the trial judge's instructions to the jury were inadequate. In particular, it is stated that the jury were not duly warned to treat the testimonies of Ms. McPherson and Mr. Deans with caution, considering that both witnesses were possible accomplices, and that the latter's evidence was also uncorroborated.

3.3 The authors allege to be victims of a violation of article 14 on the ground that defence counsel at the trial were denied access to Mr. Deans' police statement, despite requests both to the prosecution and the trial judge. It is submitted that the police statement was essential for the defence of Mr. Fraser, in particular, and Mr. Fisher because it would have exposed Mr. Deans' partiality in the proceedings as he both bore a grudge against Mr. Fraser and had been arrested in connection with the same case himself.

3.4 Mr. Fraser also claims to be a victim of a violation of article 14, paragraph 3(b) and (d), on the ground that he was inadequately represented by his counsel, as they were given at most one hour to consult prior to the trial.

3.5 Mr. Fisher claims to be have been beaten by the police on 7 October 1988, the day of his arrest. He claims that he was hit with a crowbar and that he coughed up blood. He purports to have notified both his counsel for the trial and the judge, and states that despite numerous complaints to the authorities, he has still not received any medical attention. It is submitted that this constitutes a breach of articles 7 and 10, paragraph 1.

State party's submission and counsel's comments

4.1 In its submission of 4 February 1997, in keeping with its "desire to have the examination of the communication expedited", the State party offers its comments on the merits.

4.2 The State party submits that all the issues identified relate to facts and evidence given at the trial, and makes reference to the Committee's jurisprudence where it has held that these are matters best left to an appellate court, as they in this case were to the Court of Appeal. In these circumstances, the State party asserts that this communication is not one which should be dealt with by the Committee.

5.1 In his note of 18 March 1997, counsel agrees to a combined examination of the admissibility and the merits of the communication. With regard to the admissibility and merits, counsel merely refutes the State party's assertion that the communication is not one which should be dealt with by the Committee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

6.3 With regard to the alleged violation of article 14 on the ground that the identification evidence contained serious inconsistencies and that the convictions therefore were wrongful, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the conviction was arbitrary or amounted to a denial of justice. However, the material before the Committee and the author's allegations do not show that the courts' evaluation of the evidence suffered from any such defects. Accordingly, this part of the communication is inadmissible as the authors have failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.4 Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. With regard to the alleged violations of article 14 on the ground of improper instructions from the trial judge, the Committee can therefore merely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. However, the material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from any such defects either. Accordingly, also this part of the communication is inadmissible as the authors have failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.5 Mr. Fraser has claimed that he was not afforded sufficient time with his legal aid lawyer to prepare for his trial, and that the quality of his defence therefore suffered. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence, but that the State party cannot be held accountable for lack of preparation or alleged errors made by defence lawyers unless it has denied the author and his counsel time to prepare the defence or it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. Since there is nothing in the material before the Committee which suggests either that the author and his counsel were denied opportunity to prepare adequately or that the lawyer's conduct was incompatible with the interests of justice, the Committee holds that also this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.6 With regard to Mr. Fisher's claim to be a victim of violations of articles 7 and 10, paragraph 1, on the ground that he was beaten on the day of his arrest, the Committee notes that although the author claims to have notified his attorneys and the trial judge, there is no record of this in the trial transcript. The Committee further notes that no action was taken either at the trial or at any other time to substantiate the assault, and finds that this claim is inadmissible under article 2 of the Optional Protocol for lack of substantiation.

6.7 The Committee declares admissible the claim of a violation of article 14 on the ground that the authors and their counsel at the trial were denied access to the police statement of the witness Harold Deans, and proceeds with the examination of the merits in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7. The authors' claim that they were denied access to the police statement of one of the prosecution's witnesses is raised under the general provisions of article 14, paragraph 1; taking account of the course of the trial (in which the police statement did not form part of the prosecution's case) and the conduct of the authors' defense by their counsel in relation to this matter throughout the legal proceedings, the Committee finds that the authors have not substantiated any denial of a fair trial in the determination of the criminal charges against them.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose any violations of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

CC. Communication No. 730/1996, Marshall v. Jamaica (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Clarence Marshall (represented by Mr. R. Shepherd of the London law firm Clifford Chance)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	4 December 1996 (initial submission)
Date of decision on admissibility:	3 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No. 730/1996 submitted to the Human Rights Committee by Mr. Clarence Marshall, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Clarence Marshall, a citizen of Jamaica. At the time of submission he was detained on death row in St Catherine's District Prison but his sentence was commuted in March 1997. He claims to be a victim of violations by Jamaica of articles 6, 7, 9, 10, and 14, paragraphs 1, 3 and 5, of the International Covenant on Civil and Political Rights He is represented by Mr. Robert Shepherd of the London law firm of Clifford Chance.

The facts as submitted by the author

2.1 On 10 February 1992, the author was convicted for two counts of murder and was sentenced to death in the Westmoreland Circuit Court, Savanna-la-mar. Soon after the verdict, the author began preparing an appeal against the conviction and the sentence on the grounds that the trial had been unfair and that there had been insufficient evidence to warrant a conviction. On 18 April 1994, Supplemental Grounds of Appeal were filed on behalf of the author by Ms. Arlene Harrison-Henry, an attorney-at-law of Kingston who was appointed in the place of the authors's counsel in the trial, Mr. Ronald Paris. The appeal was dismissed by the Court of

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Appeal of Jamaica on 16 May 1994. The Court of Appeal classified the murder as capital under the Offences against the Persons (Amendment) Act 1992, section 2 (1)(d)(1), and affirmed the sentence of death.

2.2 A petition for special leave to appeal to the Judicial Committee of the Privy Council was subsequently filed by the London law firm of Clifford Chance, contending that the trial Judge in his directions to the jury had erred in law in a number of important respects, and that the Court of Appeal had erred in law by concluding that this was a "case of murder or nothing." The petition was dismissed on 25 May 1995.

2.3 Counsel states that the Jamaican Government at a later stage agreed to perform a reclassification of the author's offence in accordance with section 7 of the Offences Against the Persons (Amendment) Act 1992, which requires that review is first to be performed by a single judge of the Court of Appeal and then, if appealed, by three designated judges, and not by the Court of Appeal as such. In a further submission dated 21 February 1997, counsel states that the author on 18 January 1997 was sent a form, apparently pursuant to section 7 of the Amendment Act, asking whether he wished to appeal the reclassification as capital which had been performed by a single judge to the three judge-panel. No information has been forwarded as to whether these proceedings continued, but the State party has informed the Committee that on 10 March 1997 the author's sentence was commuted to life imprisonment due to the amount of time spent on death row.

2.4 The author was convicted for the murders of Amos Harry and David Barrett, on 25 October 1990 in the parish of Westmoreland. Mr. Harry worked as a salesman for Mr. Wesley Jackson, a businessman of Hartford, Westmoreland. When murdered he was in one of Mr. Jackson's vehicles, accompanied by Mr. Barrett, a security guard employed by Alpha Security Company, the same company as employed the author. They were on a round collecting money for Mr. Jackson and were found shot in Mr. Jackson's car on the road from Montego Bay to Savanna-la-mar at 4:15 p.m.

2.5 Though it is not made clear in counsel's submission, the enclosed trial transcript shows that the prosecution's case was based mainly on a cautioned statement allegedly made in police custody by the author on 30 October 1990, and on the testimony of police constables Jalleth Gayle and Federal Bryant. Ms. Gayle testified that she was a passenger in a car going to Savanna-la-mar when the car was overtaken by another car carrying Mr. Harry and Mr. Barrett and two other men. After overtaking Ms. Gayle's car, it crashed into the iron rail on the side of the road. Ms. Gayle's car was subsequently stopped, and she saw two men running from the car, both carrying something. In the car, she found the two victims shot. Mr. Bryant testified that he was driving towards the scene of the crime when he saw the two men running from the car. He claimed that he recognized the author whom he had known for 8 years, and that he was carrying a gun.

2.6 In his cautioned statement, the author confessed that he was in the car with the two victims and a Mr. Williams. He claimed, however, that Mr. Williams, a former security guard with the Alpha Security Company, in advance had told the author that he needed money and had proposed that the author show him the route Mr. Harry would be travelling, as the author in his work often accompanied Mr. Harry. It was allegedly with this intention that on 25 October 1990 they had gone to Cornwall Mountain Road to stop, and hitch a ride from, the car driven by Mr. Harry. The author claimed that Mr. Williams, after Mr. Harry had made his last stop, shot both Mr. Harry and Mr. Barrett. The author's cautioned statement was the subject of a voir dire in which the judge decided that the authors's cautioned statement could be heard by the jury, despite his counsel's motion to have it excluded on the grounds that the author was beaten. During the voir dire, the author made a sworn statement in which he testified that he had been beaten in several ways before dictating and signing the cautioned statement. In the regular proceedings, the author gave only an unsworn statement in which he stated that he did not kill anyone, nor had he planned to kill anyone.

The complaint

3.1 Counsel alleges a violation of article 9, paragraph 3, on the ground that the author was not brought before a judge or other officer authorized by law to exercise judicial power until three weeks after he was arrested in October 1990. Reference is made to the Committee's jurisprudence, to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and to the European Court of Human Rights' jurisprudence.

3.2 Counsel alleges a violation of the right to a fair hearing by a competent, independent and impartial tribunal, as provided for in article 14, paragraph 1, because (i) the trial Judge's directions to the jury were inadequate, and (ii) the Court of Appeal exceeded its powers when classifying the crimes as capital. Accordingly, it is further contended that the imposition of the death sentence was in breach of Article 6, paragraph 2, as the proceedings which led to it were conducted in violation of the Covenant.

3.3 As to the trial judge's instructions to the jury, counsel contends that the judge failed properly to direct the jury to consider the scope of the common design between Mr. Williams and the author, and that he did not point out the possibility that Williams killed the two men but that his actions exceeded the scope of the common design previously agreed with the author, something which, according to counsel, could have led to an acquittal or a conviction for manslaughter. Furthermore, counsel alleges that the trial judge misdirected the jury by stating that it was sufficient for the Applicant to be convicted of murder if he knew of the likelihood that a firearm would be used either to effect the robbery or to escape apprehension, and that he failed properly to remind the jury of the version of events given by the author in his unsworn statement, and which effect these could have on the issue of common design and especially the scope of the common design.

3.4 As to the Court of Appeal's classification of the crimes as capital under the Offences against the Persons (Amendment) Act 1992, section 2 (1)(d)(1) upon the conclusion of the appeal, counsel submits that this classification was void and of no legal effect as it was made without jurisdiction, and that it therefore also was in breach of article 14 of the Covenant.

3.5 As to the reclassification the Jamaican Government agreed to carry out (see para. 2.3 above), counsel submits that the requirements in section 7 of the Amendment Act have not been met in the author's case, as he was not given the right to have the classification reviewed by three judges of the Court of Appeal designated by the president of the court and to appear or be represented by counsel, nor did he have the opportunity, within 21 days of the date of receipt of a decision by a single judge, to make written representations to the three judge-panel.

3.6 Counsel alleges a violation of the author's right to be represented by counsel as provided for in article 14, paragraph 3(d), and the right to a fair trial as provided for in article 14(1). Firstly, it is submitted that the author's legal aid counsel, Mr. Ronald Paris, was not appointed until one day after the preliminary hearing had begun. Secondly, it is submitted that the author's counsel at two crucial moments of the trial was absent from the courtroom. The first occasion was during the start of the examination-in-chief by the prosecution of Sergeant Bruce Clauchar, and the second was during the summing up by the trial judge.

3.7 Counsel alleges a violation of the right to have adequate time and facilities for the preparation of his defence and to communicate with counsel, as provided for in article 14, paragraph 3(b). It is submitted that after the preliminary hearing the author had no opportunity to consult with his counsel until the first day of the trial, and that during the course of the trial he was able to consult with his attorney only during the time that the court was in session. Counsel states that the author never had the opportunity to consider the prosecution statements. The result of this alleged inability to communicate with the attorney was that no investigations were carried out on his behalf with a view to refuting the prosecution charges. Reference is made to the Committee's jurisprudence.[112]

3.8 In this regard, counsel also alleges a violation of article 14, paragraph 3(e), as the alleged lack of opportunity for the author and his counsel to consult each other sufficiently before and during the trial resulted in

- the incomplete cross-examination of important witnesses
- the failure to call witnesses on behalf of the author
- the failure to extract all the information necessary to hold a proper examination in chief of the author in relation to the voir dire
- the failure to call any medical evidence in regard of the voir dire
- the failure to call any ballistic evidence in respect of discrepancy between the calibre of the bullet found in the victim's body and the calibre of the alleged murder weapon

3.9 Counsel alleges that both the right to review of the conviction as set forth in article 14, paragraph 5, and the right to communicate with and to be represented by counsel as set forth in article 14, paragraph 3(b) and 3(d), were violated in the procedures before the Court of Appeal. Counsel submits that the author only spent 15 minutes with his counsel, Miss Arlene Harrison-Henry, before the application to the Court of Appeal and argues that the author lacked opportunity to instruct his attorney, in particular on the grounds of appeal that were abandoned by Miss Harrison-Henry. The file shows that Miss Harrison-Henry in her written submission to the Court of Appeal argued 7 grounds of appeal. The court refused to grant leave to submission of the first two grounds, which both concerned the judge's failure to direct the issue of manslaughter to the jury's attention. Leave to submission of the other five grounds was granted. However, only two of these were assessed by the Court of Appeal, as Miss Harrison-Henry either conceded that the others were without substance or chose not to pursue them. The two grounds which were assessed by the court both concerned the judge's explanations to the jury on the principle of common design. The three grounds that were not pursued were that the judge failed to direct the jury on how to deal with the cautioned statement, that the judge failed to explain the meaning of the mistakes made by the witness Federal Bryant, and that the offences were not capital murder.

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[112] Communication No. 282/1988 (Leaford Smith v. Jamaica), Views adopted on 31 March 1993; communication No. 283/1988 (Aston Little v. Jamaica), Views adopted on 1 November 1991.

Counsel makes reference to the Committee's jurisprudence,[113] and submits that these concessions or failures to pursue grounds of appeal should not have been accepted by the Court of Appeal. It is implied that when accepting these omissions by Miss Harrison-Henry, the court left the author effectively without representation.

3.10 Counsel alleges violations of articles 7 and 10 both on the grounds of the treatment the author received and the circumstances in which he was held after his arrest on 25 October 1990, and on the grounds of the conditions in St Catherine's District Prison, where he has been held since 10 February 1992.

3.11 As to the first of these grounds, the author claims that when arrested on 25 October 1990 he was forcibly pushed into the police car and struck on several occasions with the butt of a pistol, and that he was kicked in the stomach and testicles. He claims to have been taken to Frome Police Station, and that, before being placed in a police cell, he was punched in the face, beaten with a belt, verbally abused and accused of being a murderer. Later the same evening and night, he claims to have been spat in the face, threatened to his life, severely beaten with both a belt and a baton, at one time by ten police officers simultaneously, including some who gave evidence against the author during the court proceedings. The author states that he gave and signed the cautioned statement only after having been beaten severely, partly with an electric wire, throughout these two days, and after having been promised that he would be allowed to go home after signing. The author also claims to have been beaten before being taken to court in November 1990 by named detectives who at the Circuit Court trial gave testimony against him. He claims to have been punched and kicked until he fell to the ground and to have been struck in the right ear with a large stone. Allegedly his entire face became swollen, his right eye was closed, he was unable to open his mouth and feared that his jaw was broken. On the way to court, one of the officers is said to have threatened to kill the author, but the other officer persuaded him not to do this. It is stated that the author complained to the judge about the beatings he had received on the same day, but that the judge said that the author was lying, and although the author offered to show his wounds, the judge declined. The author claims that as a result of the beatings he developed an ear infection which has caused him considerable pain. Several requests to see a doctor have allegedly been refused, and the author claims that the infection at the time of the submission had lasted for five years during which he has had no other medication or attention than occasional pain-killing tablets. Counsel has not submitted any medical evidence in regard of these claims.

3.12 As to the conditions in St Catherine's District Prison, counsel makes reference to a report by Amnesty International of December 1993, a report prepared by the Jamaican Council for Human Rights in summer 1994, and to the Report of the Government Appointed Task Force on Correctional Services of March 1989. The author claims that the prison conditions are insanitary, with waste sewage and a constant smell pervading the prison. He complains of the degrading and unhygienic practice of using slop buckets which are filled with human waste and stagnant water and only are emptied in the morning. In this regard, reference is made to the United Kingdom's commitment of 1991 to end the practice of slopping in all British prisons. The author also contends that the running water in the prison is polluted with insects and human excrement, and that the inmates are required to share utensils which are not cleaned properly. He also claims that at one time in

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[113] See the Committee's Views on communications Nos. 253/1987 (Paul Kelly v. Jamaica), adopted on 8 April 1991; 356/1989 (Trevor Collins v. Jamaica), adopted on 25 March 1993; 353/1988 (Lloyd Grant v. Jamaica), adopted on 31 March 1994; and 250/1987 (Carlton Reid v. Jamaica), adopted on 20 July 1990.

December 1994 he was hit in the side by a warden to such an extent that he was taken before the prison surgeon. The author contends that the conditions have caused serious detriment to his health, and that he has never received any treatment despite repeated requests. However, counsel has not submitted any medical evidence which could enlighten these claims.

3.13 Counsel also alleges a violation of articles 7 and 10 on the grounds of mental anguish and anxiety suffered as a result of incarceration on Death Row since 1992. Reference is made to the jurisprudence of the European Court of Human Rights and to the jurisprudence of the Privy Council.

State party's submission

4.1 In its submission of 3 February 1997, the State party states that it will not pursue the issue of admissibility, and instead, in order "to expedite the examination of the communication", offers its comments on the merits.

4.2 As to the alleged violations of article 14, paragraphs 3(b), 3(d) and 3(e), the State party in general terms denies that there was a breach of the Covenant. It is submitted that the allegations relate to the manner in which the legal aid counsel conducted the trial, and that the State party's duty is to appoint competent counsel and thereafter not to prevent him from effectively conducting the case. With reference specifically to the alleged violation of article 14, paragraph 3(d), on the ground that the legal aid counsel twice was absent during the trial, the State party notes that this was regrettable, but that it could not have been so detrimental to the author that it amounts to a breach of the Covenant. As to the alleged violation of article 14, paragraph 5, the State party merely states that the case "was looked at by the court and therefore there was no breach."

4.3 The State party states that it will investigate the author's claim that he was denied medical attention, and that the results of the investigation will be forwarded to the Committee as soon as they are received.

Consideration of admissibility and examination of the merits

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that the State party in its submission, in order to expedite the examination, has addressed the merits of the communication. This enables the Committee to consider both the admissibility and merits of the case at this stage, pursuant to rule 94, paragraph 1, of the rules of procedure. However, pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

5.3 With regard to the author's allegation of a violation of article 14 on the ground of improper instructions from the trial judge to the jury on the issues of identification and reasonable doubt, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. However, the material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from any such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

5.4 As to the alleged violations of article 14, paragraphs 1, 3(b) and 3(d), on the grounds of irregularities in the classification and the reclassification of the author's offence pursuant to section 7 of the Amendment Act, the Committee notes that the State party itself agreed that the initial classification was made in excess of the Court of Appeal's powers and that the State party therefore announced that it would carry out a reclassification. Thus, any violations in the original classification by the Court of Appeal would have been remedied. However, it appears that the reclassification procedure in this case was never completed as the author's sentence in the meantime was commuted by the Governor-General of Jamaica on the ground of time spent on death row. The Committee notes that the reclassification procedure at the most could have led to a finding that the author's offence was of non-capital character, with the result that the author would have been taken off death row. The same result was reached by the commutation of the author's sentence, and therefore the Committee finds that the author has failed to show that he is a victim of a violation in this respect and that his claims as to irregularities in the classification or reclassification procedure are inadmissible under article 1 of the Optional Protocol.

5.5 Concerning the author's claim that he was beaten by police officers upon his arrest in October 1990, the Committee notes that although the allegations have not been refuted by the State party, the trial transcript reveals that the author's allegations were thoroughly examined by the court in a voir dire concerning the admissibility of his confession statement as evidence. The confession statement was subsequently admitted by the judge after weighing of the evidence, and the allegations of beatings were also put before the jury in the cross-examination of one of the police officers. In the absence of a clear showing of partiality or misconduct by the judge, the Committee is not in a position to question the court's evaluation of the evidence, and the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

5.6 As to the claim by the author that he was assaulted by two named police officers on his way to the preliminary inquiry in November 1990, even if the magistrate refused to believe the author or to inspect him to see if he was injured, the author was represented by counsel on the second day of that hearing. No action was taken by counsel to substantiate the assault either at that hearing or at any other time; the author made no complaint and there is no medical corroboration of the alleged injuries. The Committee therefore finds that this claim is inadmissible under article 2 of the Optional Protocol as being unsubstantiated.

5.7 As to the claim that the author's detention on death row since 1992 constitutes cruel, inhuman or degrading treatment, the Committee reiterates its constant jurisprudence[114] that detention on death row for any specific period of time does not constitute a violation of articles 7 and 10, paragraph 1, of the Covenant in absence of further compelling circumstances. The Committee has in its jurisprudence[115] held that deplorable conditions of detention may on their own constitute a violation of articles 7 and 10 of the Covenant, but they cannot be regarded as "further compelling circumstances" in relation to the "death row phenomenon". Consequently, no relevant circumstances have been adduced by counsel or the author, and the Committee finds this part of the communication inadmissible under article 2 of the Optional Protocol. On the other hand, the author's claims of violations of the same provisions on the ground of conditions of detention in St. Catherine's District Prison, including lack of medical treatment, are, in the view of the Committee, sufficiently substantiated to be considered on the merits, and are therefore deemed admissible.

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[114] See, inter alia, the Committee's Views on communication No. 588/1994 (Errol Johnson v. Jamaica), adopted on 22 March 1996.

5.8 The Committee also declares the remaining claims admissible, and proceeds with the examination of the merits of all admissible claims, in the light of the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

6.1 The author claims to be a victim of article 9, paragraph 3, of the Covenant as he was not brought before a judge or other authorized official until three weeks after his arrest in October 1990. The Committee notes that the State party does not address this claim, and in the circumstances it finds that to detain the author for a period of three weeks without bringing him before a judge was a violation of article 9, paragraph 3, of the Covenant.

6.2 The author claims to be a victim of a violation of article 14, paragraph 3(d), because he was not represented on the first day of the preliminary hearing. In its jurisprudence,[116] the Committee has held that legal assistance must be made available to an accused faced with a capital crime not only to the trial and relevant appeals, but also to any preliminary hearing relating to the case. In the present case, the Committee notes that it is not disputed that the author was unrepresented on the first day of the preliminary hearing, and, notwithstanding that it is unclear whether the author explicitly requested legal aid, it finds that the facts disclose a violation of the Covenant. As previously held by the Committee,[117] it is axiomatic that legal assistance be available at all stages of the proceedings in capital cases. The Committee therefore finds that article 14, paragraph 3(d), was violated when the court commenced and proceeded through a whole day of the preliminary hearing without informing the author of his right to legal representation.

6.3 With regard to the alleged violation of article 14, paragraphs 1 and 3(d), on the ground that the author's counsel on two occasions during the trial was absent from the courtroom, the Committee again reiterates the importance of adequate, legal representation at all stages of the legal proceedings in capital cases. However, the Committee is of the opinion that the mere absence of defence counsel at some limited time during the proceedings does not in itself constitute a violation of the Covenant, but that it must be assessed on a case-by-case basis whether counsel's absence was incompatible with the interests of justice. With regard to the first occasion counsel was missing, the Committee notes from the trial transcripts that counsel was not present at the beginning of the prosecution's examination of Sergeant Clauchar (who had arrested the author on the day after the murders, and merely testified as to the circumstances of arrest) at 1.20 p.m. on 6 February 1992, but that he was present at 1.25 p.m. and that he at that time in fact performed a cross-examination. With regard to the second incident, the transcript shows that the judge started his summing up on 7 February 1992 with defence counsel present, but that he was absent when the proceedings resumed on 10 February 1992. Although defence counsel's absence during the summing up is a matter of some concern, the Committee notes that all the major legal issues had been dealt with on 7 February and that the judge during counsel's absence merely summarized the facts. Moreover, counsel conveyed a message to the court that he had no objections to the judge's continuing. The Committee therefore holds that the facts before it do not reveal a violation of the Covenant on this ground.

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[115] See, inter alia, the Committee's Views on communication No. 705/1996 (Desmond Taylor v. Jamaica), adopted on 2 April 1998.

[116] See the Committee's Views on communication No. 459/1991 (Osbourne Wright and Eric Harvey v. Jamaica), adopted on 27 October 1995.

[117] See, inter alia, the Committee's Views on communication No. 223/1987 (Frank Robinson v. Jamaica), adopted on 30 March 1989.

6.4 The author also alleges a violation of article 14, paragraphs 3(b), 3(d) and 3(e), on the ground of lack of opportunity to communicate with his counsel before and during the trial, with the result that no investigation was initiated on his behalf, that no witnesses were called and no depositions were taken on behalf of the author, and that counsel was not in a position to adequately cross-examine the prosecution's witnesses. In this context, the Committee reiterates its jurisprudence that where a capital sentence may be pronounced on the accused, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defense. The Committee notes that the author's legal aid counsel was assigned in due time for the trial. Furthermore, neither counsel nor the author actively requested an adjournment, and there is nothing else in the trial transcript which can suggest that the State party denied the author and his counsel opportunities to prepare for the trial or that it should have been manifest to the court that the defence team was inadequately prepared. Similarly, as to counsel's failure to call witnesses and to provide medical and ballistic evidence on behalf of the author, the Committee recalls its prior jurisprudence that it is not for the Committee to question counsel's professional judgement, unless it was clear or should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. In the circumstances, the Committee finds that the facts before it do not show a violation of article 14 on these grounds.

6.5 Similarly, as to the alleged violation of article 14, paragraphs 3(d) and 5, on the ground that the author was not effectively represented on appeal, the Committee notes that the new counsel met with the author before the appeal hearing, and that she argued grounds of appeal on his behalf. There is nothing in the file which suggests that counsel was exercising other than her professional judgement when choosing not to pursue certain grounds. Nor is there anything in the file to suggest that the State party denied the author and his counsel time to prepare the appeal or that it should have been manifest to the court that the lawyer's conduct was incompatible with the interests of justice. With reference to its prior jurisprudence, as cited by counsel, the Committee notes that it has found violations of the provisions in question in situations where counsel has abandoned all grounds of appeal and the court has not reassured that this was in compliance with the wishes of the client. This jurisprudence does not, however, apply to this case, in which counsel argued the appeal, but chose not to pursue certain grounds. The Committee concludes, therefore, that there has been no violation of article 14, paragraphs 3(d) and 5, on this ground.

6.6 With regard to the author's claim to be a victim of article 6, paragraph 2, of the Covenant, the Committee notes its General Comment 6[16], where it held that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence and the right to review of the conviction and sentence by a higher tribunal". In the present case, the preliminary hearing was conducted without meeting the requirements of article 14, and as a consequence the Committee finds that also article 6, paragraph 2, was violated as the death sentence was imposed upon conclusion of a procedure in which the provisions of the Covenant were not respected.

6.7 As to the allegation of a violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of the conditions of detention, including lack of medical treatment, at St. Catherine's District Prison, the Committee notes that the author has made specific allegations. He states that the prison conditions are insanitary, with waste sewage and a constant smell pervading the prison, and complains of the degrading and unhygienic practice of using slop buckets which are filled with human waste and stagnant water and only are emptied in the morning. The author also contends that the running water in the prison is polluted with insects and human excrement, and that the inmates are required to share utensils which are not cleaned properly. He also claims that in December 1994 he was hit in the side by a warden to such an extent that he was taken before the prison surgeon. The author contends that the conditions have caused serious detriment to his health, and that he has never received any treatment despite repeated requests. The State party has not refuted these specific allegations, and has not forwarded any results of the announced investigation into the author's allegations that he has been denied necessary medical attention. The Committee finds that these circumstances disclose a violation of article 10, paragraph 1, of the Covenant.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of article 9, paragraph 3, article 10, paragraph 1, article 14, paragraph 3(d), and consequently, article 6, paragraph 2.

8. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide Mr. Marshall with an effective remedy, including compensation.

9. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol the communication is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State Party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

DD. Communication No. 752/1997, Henry v. Trinidad and Tobago (Views adopted on 3 November 1998, sixty-fourth session)*

Submitted by:	Allan Henry (represented by Mr. S. Lehrfreund of Simons Muirhead and Burton, a law firm in London)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	9 September 1996
Date of decision on admissibility:	3 November 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 3 November 1998,

Having concluded its consideration of communication No. 752/1997 submitted to the Human Rights Committee by Allan Henry, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Mr. Allan Henry, a Guyanese citizen serving a life sentence at the State Prison in Port-of-Spain, Trinidad. He claims to be a victim of violations by Trinidad & Tobago of articles 7 and 10, paragraph 1, as well as article 14, paragraph 1, of the Covenant. He is represented by Mr. Saul Lehrfreund of Simons, Muirhead & Burton, a law firm in London, England.

1.2 On 8 July 1983, the author was sentenced to death for the murder of an English sailor. He was detained on death row until the commutation of his sentence to life imprisonment on 4 January 1994.[118] An earlier communication by Mr. Henry to the Human Rights Committee, claiming violations of articles 10 and 14 was declared inadmissible by the Committee for non-substantiation with regard to the claim under article 14, and for non-exhaustion of domestic remedies with regard to the claims under article 10.[119] In the present communication, the author requests that the Committee's previous decision with regard to the admissibility of his claims under article 10 be reviewed in accordance with rule 92, paragraph 2, of the Committee's rules of procedure.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

[118] The author's death sentence was commuted following the judgement of the Judicial Committee of the Privy Council in Pratt and Morgan v. Jamaica of 3 November 1993.

Facts as submitted by the author

2.1 The author states that he was beaten on the head by prison officers on 3 May 1988, resulting in a head wound which required several stitches. The author states that he submitted a complaint to the Ombudsman, on an unspecified date,[120] and that on 16 July 1993 the Office of the Ombudsman replied that it had investigated his complaints and that the investigation revealed that the matters complained of were already receiving the attention of the Prison authorities.

2.2 The author further submits that the medical treatment in prison is wholly inadequate and deficient. According to the author, due to the lighting in his cell on death row, his eyes have become extremely sensitive to light and he has to wear dark glasses. He states that he saw an eye specialist on 10 March 1994, but that he still has not received any new eye glasses, although his eye sight has deteriorated.

2.3 The author states that during his detention on death row, he was confined in a 9 x 6' cell for 23 hours a day. A light burned in his cell 24 hours a day and no natural lighting existed. There was no integral sanitation in the cell. There was a ventilation hole, measuring 8" x 8", but no window. The exercise periods were insufficient and were not longer than one hour in a small exercise yard with handcuffs on.

2.4 According to the author, the conditions of his detention have not improved since the commutation of his death sentence. He shares a 9 x 6' cell with one other life timer and between eight and fourteen convicted prisoners, some of whom suffer from diseases or are drug addicts. The cells are filthy and infested with roaches, flies and rats. Since there is one iron bed with one mattress, the author and his cell mates are forced to sleep on the floor on pieces of a cardboard box. They are locked in the cell from 3:00 p.m. to 7:00 a.m., when breakfast is served, and then again from 8:00 a.m. to 11:00 a.m. No sanitation is available in the cell other than one slop bucket to be shared by all cell inmates. The toilets are ten feet away from the kitchen, and the kitchen is infested with rats and insects. The author moreover states that no provisions are made for his dietary needs as a Muslim. No medication is available for his haemorrhoids.

2.5 Further, the author states that in June 1987, he requested legal aid for the filing of a constitutional motion. A copy of the constitutional motion which was submitted by the author with his previous communication No. 302/1988, shows that the motion was based on the alleged unconstitutionality of the author's execution (as cruel punishment), as well as on the length of his stay on death row and the conditions of his detention. The author obtained legal assistance from a local humanitarian organization, which filed a constitutional motion on his behalf. However, the motion was abandoned when his representatives were informed that no financial assistance was made available by the judicial authorities. The author states that he made numerous attempts to obtain legal aid for a constitutional motion, to no avail.

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[119] Communication No. 302/1988, declared inadmissible on 31 October 1990.

[120] Apparently after the Committee's decision of 31 October 1990 with regard to his earlier communication No. 302/1988.

The complaint

3.1 The author claims that the beatings of 3 May 1988, the lack of adequate medical treatment and the conditions of his detention both before and after the commutation of his death sentence constitute a violation of articles 7 and 10 of the Covenant.

3.2 The author moreover claims that he is a victim of a violation of article 14, paragraph 1, in conjunction with article 2, paragraph 3, of the Covenant, since he has not been granted legal aid to appeal to the Constitutional Court and he is thus denied access to court.

State party's observations and counsel's comments

4.1 In its response, dated 27 November 1997, the State party denies that it is unwilling to grant legal aid for constitutional motions, and submits that legal aid is made available for the purpose. According to the State party, the author only applied for legal aid once, on 25 June 1987. His application was rejected by the Legal Aid Authority on 31 December 1987, after due consideration and in accordance with the Legal Aid and Advice Act. Since that date, the author has not formally applied for legal aid, but merely written to various persons and bodies in an attempt to have the rejection of legal aid reversed. The State party submits that the author can apply for legal aid at any time. It explains that the granting of legal aid is not automatic.[121]

4.2 In light of the above, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies.

4.3 In order to expedite the consideration of the communication, the State party also addresses the merits of the author's complaint. With regard to the alleged beatings on 3 May 1988, the State party submits that the prison records show that the author was involved in an altercation with a prison officer. In self-defence, the officer struck the author with his regulation baton, which resulted in the author receiving a wound to his head. The author was charged with assault. Following an investigation by the prison authorities, the charge against the author was dismissed on 9 May 1988 because of insufficient evidence. The State party argues, however, that this does not reflect upon the veracity of the officer's evidence and maintains that the author's aggression necessitated the use of force and that no more than necessary force was used. The State party adds that the author's complaint against the officer was fully investigated. The State party further denies that the author has been singled out for exceptionally harsh treatment.

4.4 With regard to the author's complaint about the lack of medical treatment, the State party submits that the allegation is unfounded. According to the prison records the author first sought to have his spectacles renewed in 1991. This was done. Following a visit to an eye specialist the author was provided with a new pair of spectacles on 13 October 1995. In this context, the State party explains that prison regulations require that a death row prisoner be subject to constant observation, and that for this reason the light in the cell is on 24 hours a day. The State party further explains that all medical complaints made by inmates are dealt with as quickly as possible. According to the State party, records reveal that the author was seen by the Prison Medical Officer on numerous occasions and was satisfactorily treated.

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[121] See below, paras. 4.10 and 4.11.

4.5 With regard to the prison conditions, the State party denies that they amount to a violation of article 7 of the Covenant. It accepts, however, that article 10 is relevant in this context. According to the State party, the "issue before the Committee is whether the Applicant during his incarceration in the State Prison has been treated with humanity and with respect for the inherent dignity of the human person. It is respectfully submitted that in determining this question the Committee should treat with caution the allegations put forward by or on behalf of the Applicant which are largely unsubstantiated and grossly exaggerated."

4.6 The State party submits that since the commutation of his death sentence, the author shares his cell with no more than five other prisoners at the time. Every cell is constructed to allow for natural light. Additionally, each cell is fitted with sufficient bedding to avoid any inmate sleeping on cardboard on the floor. According to the State party, it is inevitable in a tropical climate that cockroaches will be found in all habitations; it submits that this is a problem which is not exclusive to the prison environment. The State party states that every effort is made to ensure that such pests are controlled and that health standards are maintained.

4.7 The State party explains that the slop buckets are emptied at least three times a day, at 6:00 a.m., 12:00 noon and 6:00 p.m. The State party further submits that since the author's sentence has been commuted he enjoys at least four hours a day in the open air. Reading materials such as magazines and newspapers are available to the prisoners on a regular basis, and opportunity is provided to undertake correspondence courses.

4.8 The State party rejects the author's allegation that no provision is made for his special dietary needs as a Muslim. According to the State party, in the preparation of the meals consideration is given to inmates of the various religious groups. Strict standards of hygiene are observed. In this connection, the State party explains that personnel from the Ministry of Health visit the prisons regularly to ensure that health standards are observed.

4.9 In the light of the above, the State party denies that the author has been subjected to treatment which would violate either article 7 or article 10 of the Covenant.

4.10 The State party contests the author's allegation that he has been denied access to Court, because he has not been given legal aid for a constitutional motion. The State party points out that in principle legal aid is available for constitutional motions. Section 23 of the Legal Aid and Advice Act allows the Legal Aid Authority to grant aid if "the Authority is of the opinion that the Applicant has reasonable grounds for taking the proceedings". The author made his application for legal aid on 25 June 1987 and on 31 December 1987, legal aid was refused. According to the State party, no subsequent application for legal aid for a constitutional motion has been made by the author. Due to the legal privilege between the author and the Legal Aid Authority, the State party cannot ascertain the reasons for the refusal of legal aid. The State party submits that the author is free to apply again for legal aid if he so wishes. It considers without merit, however, his claim that he is being denied access to the courts on the basis of a legal aid application rejected in 1987.

4.11 It is the submission of the State party that all States which administer a legal aid scheme from public funds must have the right to reject applications which are frivolous, vexatious or without merit. There is no right of unlimited access to the courts at public expense in such cases. According to the State party, only if the author is able to argue that the refusal of legal aid was founded upon irregularity, irrationality or procedural impropriety should he be able to allege that he has been denied access to the courts.

5.1 In his comments on the State party's submission, dated 3 April 1998, counsel rejects the State party's argument that the communication is inadmissible for non-exhaustion of domestic remedies. He submits that the author requested legal aid for a constitutional motion, that this was refused, and that he has thus done everything in his power to exhaust domestic remedies.

5.2 With regard to the incident of 3 May 1988, counsel submits that the general denials of the State party are insufficient to satisfy the requirements of article 4 (2) of the Optional Protocol. He argues that the State party has a duty to investigate in good faith all allegations of violations of the Covenant and inform the Committee accordingly. In this context, he notes that the State party relies on prison records which have not been made available to the Committee. He also notes that the State party has not provided any substantiation for its statement that the author's complaint against the police officer was fully investigated. Counsel further argues that the fact that the author was not charged with assault contradicts the State party's assertion that the officer was acting in self-defence.

5.3 Also with respect to the medical treatment, counsel notes that the State party has not provided copies of the medical records which allegedly show that the author has received medical treatment.

5.4 Counsel notes that the State party's reply in respect to the prison conditions only relates to the conditions since the commutation of the author's death sentence and that it has not addressed his complaint about the conditions during his detention on death row.

5.5 Counsel maintains that the conditions of the author's detention both before and after commutation constitute a violation of articles 7 and 10 of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has argued that the communication is inadmissible for non-exhaustion, because the author has not filed a constitutional motion. Counsel has argued that the author cannot file a constitutional motion, because no legal aid has been made available to him. In the circumstances, the Committee finds that the constitutional motion is not a remedy which is available to the author, within the meaning of article 5, paragraph 2 (b), of the Optional Protocol.

6.3 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.4 The Committee finds therefore that the communication is admissible. The State party has provided information on the merits, in order to expedite the consideration of the communication. The Committee thus proceeds without further delay to the examination of the merits of the communication.

7.1 With regard to the incident on 3 May 1988, during which the author was beaten on the head, the Committee notes that the State party has provided information that the use of force by the prison officer was necessary in self-defence. The author has challenged this information, and referred to the fact that he had not been charged with any offence in this connection. The Committee notes that from the information made available by the parties, it appears that the reason given by the State party to explain the force used over Mr. Henry, namely self-defence, was examined in the procedure before the Superintendent of Prisons in order to determine whether the author had committed an assault against the prison officer, and subsequently rejected, since the charge against the author was dismissed. In light of the above and considering that the State party has failed to inform the Committee about the outcome of the investigation of the author's complaint against the prison officer, the Committee finds that the State party has failed to show that the use of force on the author was necessary. Consequently, this constitutes a violation of article 7 of the Covenant.

7.2 With regard to the author's complaint that he does not receive proper medical treatment and in particular, that he has not been given new eye-glasses since 1994, the Committee notes that the State party has stated that according to the medical records the author received new spectacles in October 1995. The Committee is of the opinion that the facts before it do not show that the Covenant has been violated in this respect.

7.3 The State party has failed to provide any information with regard to the conditions of the author's detention on death row. In the circumstances due weight must be given to the author's allegations, if substantiated. The Committee finds that the circumstances of detention as described by the author amount to a violation of article 10, paragraph 1, of the Covenant.

7.4 The State party has contested the information provided by the author concerning the circumstances of his detention since the commutation of his death sentence. The Committee notes, however, that the State party admits that the author is being kept in a 9 x 6' cell together with five other inmates; nor has the State party challenged that the prisoners share a single slop pail. The Committee finds that such overcrowding is not in compliance with the requirement that prisoners be treated with humanity and with respect for the inherent dignity of the human person and constitutes a violation of article 10, paragraph 1.

7.5 Counsel has claimed that the absence of legal aid for the purpose of filing a constitutional motion in itself constitutes a violation of the Covenant. The State party has challenged this claim saying that legal aid is in principle available for constitutional motions, but that the granting of legal aid is not automatic but subject to conditions. The Committee has held on previous occasions that the determination of rights in the hearing of constitutional motions must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1, and that legal assistance must be provided free of charge where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interest of justice so requires.[122]

7.6 In this particular case, the issue which the author wished to bring in the constitutional motion was the question of whether his execution, the conditions of his detention or the length of his stay on death row amounted to cruel punishment. The Committee considers that, although article 14, paragraph 1, does not expressly require States parties to provide legal aid outside the context of the criminal trial, it does create an obligation for States to ensure to all persons equal access to courts and tribunals. The Committee considers that in the specific circumstances of the author's case, taking into account that he was in detention on death row, that he had no possibility to present a constitutional motion in person, and that the subject of the constitutional motion was the constitutionality of his execution, that is, directly affected his right to life, the State party should have taken measures to allow the author access to court, for instance through the provision of legal aid. The State party's failure to do so, was therefore in violation of article 14, paragraph 1.

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[122] See, inter alia, the Committee's Views in respect of communications Nos. 377/1989 (Anthony Currie v. Jamaica), adopted on 29 March 1994, and 705/1996 (Desmond Taylor v. Jamaica), adopted on 2 April 1998.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7, 10, paragraph 1 and 14, paragraph 1, of the Covenant.

9. Under article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide Mr. Allan Henry with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, Trinidad and Tobago have recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

EE. Communication No. 754/1997, A. v. New Zealand (Views adopted on 15 July 1999, sixty-sixth session)*

Submitted by: A (name withheld)

Alleged victim: The author

State party: New Zealand

Date of communication: 19 April 1996

Date of decision on admissibility: 15 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 15 July 1999,

Having concluded its consideration of communication No.754/1997 submitted to the Human Rights Committee by A (name withheld), under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is A (name withheld) a citizen of New Zealand, residing in Herne Bay, Auckland. He claims to be a victim of violations of his human rights by New Zealand.

The facts as submitted

2.1 The author, who was born in December 1955, was arrested[123] in October 1983 for harassing a young woman (B, name withheld) whom he had met about five years before and for whom he had developed an obsessive interest, persistently pursuing her. At the Court hearing, on 20 January 1984, the author was searched and a 22 centimetre carving knife was found on his body. The author was convicted for assault of the woman (he had grabbed her at the wrist in order to make her stop and talk to him) and remanded on the weapons charge. A psychiatric examination was ordered and undertaken by a Dr. Gluckman. In the psychiatrist's opinion the author showed elements of a paranoid personality, but did not suffer from a mental disorder committable under the Mental Health Act. On 3 February 1984, the author was sentenced to four months' periodic detention. However, he failed to comply with his obligations under the sentence and continued to approach and follow the young woman. On 12 March 1984, the author was arrested again on charges of intimidation.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by two Committee members is appended to the present document.

[123] The author had one prior criminal conviction for threatening to damage property of Television New Zealand and was sentenced in October 1982 to one year probation.

2.2 Following an application under the Mental Health Act for a reception order to be made in respect of the author, the District Court, on 5 April 1984, ordered the author detained for observation at Carrington Hospital until the next hearing on 13 April 1984. The staff at the hospital examined him and concluded that he was not suffering from a committable mental disorder. Consequently, on 13 April 1984 he was released and the application for a reception order was dismissed.

2.3 On 18 May 1984, the author was convicted and sentenced to two months' imprisonment for breaching his obligations under the sentence of periodic detention. He was convicted and discharged on the charge of intimidation.

2.4 On 6 June 1984, while in the Mt. Eden prison, the author was interviewed by a Dr. Whittington, who had already examined the author in 1983, and who opined that he was a paranoid personality, and that he contemplated killing the young woman and commit suicide. According to the author, the stress of being imprisoned had become so strong that he tried to obtain a transfer to Carrington Hospital from where he had been released on a previous occasion. Apparently, he was informed that he could not be transferred to Carrington as a voluntary patient, because his sentence had almost expired.

2.5 On 13 June 1984, the author was again interviewed by three psychiatrists, among whom Dr. Whittington, who concluded that his obsession had become so entrenched that it had assumed delusional intensity, and that he was committable because of potential danger to himself and others. On 16 June 1984, a District Court Judge made a reception order under section 24 of the Mental Health Act, and directed that he be detained in Lake Alice Hospital, 500 kilometres away. He was placed in the Maximum Security section by the Director of Mental Health.

2.6 The author then requested the Minister of Health to intervene and an inquiry under section 73 of the Mental Health Act was held by District Court Judge Unwin on 16 November 1984. The judge concluded that the author should remain detained under the Mental Health Act, although he was not convinced that the author was mentally disordered.[124] Subsequently, the author refused cooperation with the medical and psychiatric staff at the hospital and tried to pursue his release through application for habeas corpus, all to no avail. It appears from the documents submitted by the author that conflicting psychiatric opinions with regard to the author's mental health existed. According to the author, the psychiatrists expressing a view that he had a mental disorder and should remain committed based themselves on single interviews with him and did not seriously examine him.

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[124] The judge considered:

"I have serious reservations about what he [A] may do if he is discharged, and just as serious reservations what may happen to him if he stays in the Maximum Security Villa. I think there is a build up of pressure in his mind, that needs to be treated and dissipated. At the present time, it would take some persuasion for me to be satisfied that Mr. [A] is mentally disordered. On the other hand, if his present situation continues for too long, he might well regress.

"Pursuant to section 73 (a) I have to be satisfied that the patient is fit to be discharged. Subsection (13) reads "For the purposes of this section, a patient is fit to be discharged when his detention as a mentally disordered person is no longer necessary either for his own good or in the public interest."

2.7 After the finding of Judge Unwin in 1984 that the author should remain committed, even though he might not be mentally disordered, articles appeared in the news media criticizing the committal policy and calling for the author's release, since his detention was considered illegal. After a seven day hearing in the High Court in April 1986, Judge Greig dismissed the application for the author's release and ordered a prohibition of publicity of the proceedings and of the names of the persons involved.

2.8 In the second half of 1986, the author was placed in a medium security ward. In November 1986, the review panel refused his request to be transferred to an institution in Auckland. In early December 1986, the author escaped, but was arrested by the police some days later. He was then returned to the Maximum Security ward.

2.9 Following a letter in December 1987 from both the author and the superintendent of Lake Alice Hospital, Ellis J decided to conduct a further judicial inquiry. The hearing commenced on 26 September 1988 and was adjourned after an agreement was reached under which the author was to be returned to the community by degrees. The author was then transferred to Tokanni Hospital. The author, after having overheard a conversation between the Superintendent and the staff, was convinced that he would be returned to Lake Alice at the earliest opportunity and escaped on 24 December 1988. He went to his mother's house, but was arrested after thirteen days. He escaped again about a month later and was rearrested after six days. After yet another escape, the author negotiated that he would give himself up at Carrington Hospital.

2.10 After having been detained at Carrington for some weeks, in April 1989 the author was released on leave under the condition that he report for examination at a nearby clinic once a week. In desperation about not being discharged from compulsory status altogether, the author wrote to his Member of Parliament, threatening to shoot the police if they would force him back to Lake Alice. On 9 August 1989, the author was arrested by the police and found in possession of a loaded rifle with telescopic sights. His leave was then revoked and he was returned to Lake Alice Maximum Security wing.

2.11 Charges were laid against the author for threatening the police. The author initially pleaded not guilty, but found out that if convicted to imprisonment, his committal order would lapse automatically, pursuant to section 28 (4) (b) of the Mental Health Act. He then decided to plea guilty. However, upon request from the Crown, the Judge convicted the author and discharged him and he was returned to Lake Alice Hospital. The author's appeal against his sentence was dismissed.

2.12 In April 1990, the adjourned judicial inquiry was reconvened. The author states that he had no legal representation, that he was only shown the papers at the hearing, and that he was not allowed to cross-examine the Director of Mental

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"It seems therefore, that my duty is not to determine whether Mr. [A] is still certifiable, but whether his detention in a hospital is still necessary either for his own good or in the public interest.

"My view is that on both counts the detention is still necessary."

Health who was at the hearing. He had only been able to call his mother to give evidence on his behalf. According to the author, the hearing lasted only one and a half hour and the psychiatrists who gave evidence had not examined him for nearly two years. The judge found him mentally disordered and dismissed his application for release.

2.13 In September 1990, the author embarked on a hungerstrike which lasted 46 days. He was then transferred to Kingseat Hospital in November 1990. A few weeks later he escaped and was at large for three days. He was returned to Lake Alice. After 7 months in Lake Alice, he commenced another hungerstrike, which he ended when he received assurances he would be transferred to Kingseat. Recognizing that the author had not been represented by counsel at the reconvened enquiry by Ellis J, Gallen J agreed to conduct another s.74 enquiry, with representation for the author, but limited to questions of law. After having heard arguments whether or not his mental condition required detention, Gallen J concluded that the test was the potential for serious physical violence and held that the material before Ellis J was sufficient in law to meet the test. In June 1991, the author was transferred to Kingseat, and from there to Carrington. A review panel which met in December 1991 found that the author had made good progress toward recovery and that "while we would not recommend his discharge from committal, if he was seen now de novo we all agreed that he would not be committable." Subsequently, the author was allowed weekend leave.

2.14 On 30 April 1992, he was released on leave, under the condition that he report once a week to the out patient clinic. In July 1992, after a further judicial inquiry upon the author's application, the judge refused to discharge the author, in order to ensure that he continued treatment. According to the author, the Judge based himself on evidence by doctors of the Auckland Hospital Board, who hardly knew him.

2.15 On 19 February 1993, upon application from the author under section 79 (1) (a) of the Mental Health Act 1992, the Mental Health Review Tribunal discharged the author from compulsory status.

2.16 The author filed a claim for damages of NZ$ 5,000,000 with the High Court, for wrongful detention. In reply, the Crown requested the Court to strike out the claim on the ground that the statement of the claim disclosed no reasonable cause for action. The High Court, by decision of 28 October 1993, dismissed the Crown's application. The Court of Appeal however, by judgments dated 20 December 1994 and 19 May 1995, allowed the Crown's appeal and struck out the author's claims.

2.17 In the meantime, on 9 May 1994, the author was found guilty of sending letters containing threats to kill. He had sent a letter to a Member of Parliament threatening a blood bath if he would not get millions of dollars compensation. The author was sentenced to 15 months' imprisonment.

2.18 In June 1995, the author was provided access to some of the information held by the Police and the Ministry of Health but refused access to other information pursuant to the Privacy Act 1993. Under the terms of the Privacy Act, both the Police's and the Ministry's decision to withhold information were investigated by the independent Office of the Privacy Commissioner, who concluded that there were sufficient justifications for withholding information in compliance with the Act. Subsequently, the Complaints Review Tribunal examined the author's complaint under the Privacy Act. In the course of the hearing some additional information was made available to the author. In March 1997, the Complaints Review Tribunal rejected the author's demand under the Privacy Act 1993 that he be provided with all the information the Ministry of Health and Police held concerning his arrests and compulsory treatment. The Tribunal determined that the agencies had acted appropriately in withholding certain information, since its disclosure would be likely to endanger the safety of some individuals and would trigger behaviour on the part of the author which would prejudice his rehabilitation.

The complaint

3.1 The author claims that his original detention under the Mental Health Act was unlawful, and that judge Unwin, not being convinced that he was mentally disordered, acted arbitrarily and unlawfully in not discharging him.

3.2 He further contends that the yearly review hearings by a panel of psychiatrists were unfair, in that he had no access to the documents they based themselves on and could not call any witnesses on his behalf. In his opinion, the hearings were orchestrated to continue his unlawful detention.

3.3 In support, the author states that numerous psychiatrists testified that he was not mentally ill and not committable. He emphasizes that his incarceration continued in spite of medical evidence that his mental state did not warrant continued detention and in spite of the fact that he had not committed any act of violence. He argues that, if at any point after the beginning of his detention at Lake Alice Hospital, he suffered from a mental disorder, this was caused by his unlawful and unjustified detention among mentally ill people with a history of violence by whom he felt threatened.

3.4 The author submits that because of his long detention, he has found it difficult to reintegrate himself into community life, to have friendships and to get a job. He feels he is stigmatized for life as a dangerous madman.

3.5 The author further claims that he has no access to the information held about him by the Police and the Department of Health and that his requests for disclosure of the files to him have been refused.

State party's observations

4.1 By submission of 28 October 1997, the State party addresses both the admissibility and the merits of the communication.

4.2 First, the State party argues that the communication is inadmissible. The Optional Protocol entered into force for New Zealand on 26 August 1989 and, with reference to the Committee's jurisprudence in this regard, the State party argues that the Committee is thus precluded from examining complaints relating to alleged violations by New Zealand that occurred before that date. The State party notes that the original decisions to place the author under compulsory treatment and to detain him were made in 1984, that is before the entry into force of the Optional Protocol for New Zealand. According to the State party, no continuing effects exist, since under the Mental Health Act, each judicial and administrative review in the case constituted a fresh assessment of his mental health to determine what level of detention would be suitable, whether he should be granted probationary release into the community, whether the compulsory treatment order should be completely removed. In this context, the State party recalls that the author was released into the community in April 1989, but arrested on 9 August 1989 after having written a threatening letter and while in possession of a loaded rifle. He was then reassessed and returned to detention. The author's continued compulsory treatment must thus be seen as a consequence of his behaviour in 1989, according to the State party, and his complaints concerning the order of 1984 and the judicial reviews of that order before August 1989 must thus be deemed to be inadmissible ratione temporis.

4.3 Further, the State party argues that the author has not substantiated his claims for purposes of admissibility. According to the State party, the decisions in the author's case were taken in accordance with the law. In order to protect the author's right to liberty, several reviews were undertaken. The State party submits that at the relevant times, the mental health profession, the judiciary and the police had substantial grounds for believing that the author posed a distinct danger to B, the community and himself. The State party further notes that none of the independent judicial reviews of the author's compulsory treatment regime found any wrong doing on the part of the authorities.[125]

4.4 With regard to the author's claim that he has no full access to the information held about him by the police and the Ministry of Health, the State party explains that after his application was rejected by the Complaints Review Tribunal, the author was informed that he could file an appeal from the Tribunal's decision within 30 days. Since he has failed to give notice of appeal, the State party argues that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol, for non-exhaustion of domestic remedies.

4.5 With regard to the merits of the communication, the State party submits that the facts do not disclose a violation of any of the rights contained in the Covenant. According to the State party, at the time of his committal in 1984, the author had developed a serious mental disorder which posed a significant threat to himself and others. The State party submits that a careful and lengthy psychiatric examination was carried out by three specialists, one of whom had previously found that the author's condition did not require compulsory treatment. All three specialists formed the opinion that at the time the author's condition had deteriorated to a level requiring compulsory treatment in secure detention. Accordingly, a committal order was granted following the procedures required by the Mental Health Act 1969. The State party points out that several courts have since reviewed the use of this procedure in the author's case, and found that the legislative requirements were fully complied with. Further, to ensure the author's civil rights, the Mental Health Services administration set up regular reviews of his condition and recommended a judicial inquiry be conducted. This was done by Unwin DCJ in November 1984.

4.6 According to the State party, the author has failed to substantiate any accusations of unlawfulness, malice, unfairness or arbitrariness on behalf of the psychiatrists or the District Court Judge. The State party submits that in accordance with the legislative requirements, Unwin J found that the author's condition still required compulsory treatment and detention for his own good or in the public interest. The State party emphasizes that under section 73 (a) of the Mental Health Act 1969, it was not the judge's duty to determine whether the author was certifiable, but whether his detention in a hospital was still necessary either for his own good or for the public interest. In the further judicial reviews of the author's status under the compulsory treatment order, there was never any evidence that the Judge's findings were in any way arbitrary or inconsistent with his obligations under the Mental Health Act.

4.7 With regard to the author's complaint that the regular psychiatric reassessments of his condition by the Hospital's review panels were unfair hearings and designed to continue his detention, the State party recalls that the author's compulsory treatment status was independently and judicially reviewed on eight separate occasions. None of these reviews found any evidence to substantiate the author's criticism of the Hospital's psychiatric review panels. The State party submits that the record illustrates the various attempts to rehabilitate the author back into the community, which were all defeated by his repeat offending or breaking of the conditions of his transfer to the community or lower security hospitals.

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[125] The State party refers to the decision by the New Zealand Court of Appeal (1995) which described the author's allegations of conspiracy as "vexatious and an abuse of the Court's process".

4.8 With regard to the author's claim that he has been prevented from disclosing information concerning his case to the public, in relation to Grieg J's order in 1986 preventing publication of the proceedings, the State party notes that article 14, paragraph 1, provides that the press and the public may be excluded from all or part of the trial when the interest of private lives of the parties so requires. Further, the State party refers to article 19, paragraph 3, which states that freedom of expression may be subject to restrictions as provided by law and necessary for respect of the rights and reputations of others. The State party submits that Greig J's order that there would be no publication of the proceedings and that there would be no publication of anything which would lead to the identification of the author, B or her family, was done to protect the privacy, safety and reputation of others who had been affected by the author's actions.

4.9 With regard to the author's claim that he was not given access to all personal information kept about him by the Police and Ministry of Health, the State party refers to the findings of both the Privacy Commissioner and the Complaints Review Tribunal that there was proper justification for withholding the information, as its release would be likely to endanger the safety of some individuals or trigger behaviour on the part of the author which would prejudice his safe rehabilitation.

4.10 In general, to address the question whether the author, who had never actually committed a serious violent offence, should have been subjected to such a lengthy period of compulsory treatment in the presence of conflicting medical opinion as to the seriousness of his mental illness, the State notes that even those specialists who stated that the author should not be subjected to compulsory treatment, still agreed that the author suffered from a serious personality disorder. Some of those specialists altered their opinion upon further study of the author's behaviour and interviews. The author has been examined by a number of skilled psychiatrists with experience in dealing with personality disorders and the general conclusion is that he has not only a personality disorder, but also a mental (paranoid or delusional) disorder which can evolve under stress to a frankly psychotic illness. According to the State party, the only reason why the author has not committed a serious violent offence is due to the precautions and protective actions of Police and Mental Health authorities. The State party emphasizes that the periods of maximum security detention only followed instances where the author had displayed threatening behaviour associated with weapons or after he had absconded when attempts were made to treat him in lower security environments.

The author's comments

5.1 In his comments on the State party's submission, the author invokes violations of:

- article 7, because he was unlawfully imprisoned by the New Zealand Government and forced to go on a hunger-strike for 46 days to get out of maximum security psychiatric hospital.

- 9, paragraphs 1, 4 and 5, because he was unlawfully imprisoned from 1984 to 1993 in mental institutions and was then sentenced to 15 months' imprisonment for threatening those responsible for unlawfully imprisoning him. According to the author, the sentence was malicious and used to cover up his unlawful imprisonment. He further states that only 10% of his applications for judicial reviews were accepted, and that all hearings were whitewashes. Finally, he states that he has not received any compensation for his unlawful imprisonment.

- 10, paragraph 1, since he was detained in a maximum security psychiatric institution while he has never been mad.

- 12, paragraph 2, because in 1984 he requested from the Minister of Health permission to leave New Zealand, rather than stay in the psychiatric hospital, so that he could no longer be a threat to anyone in New Zealand, and this was refused.

- 14, paragraphs 1 and 7, because the courts perverted the course of justice to have him unlawfully imprisoned, and the hearings were not public and media access was denied. He further complains that seven and a half years were added to his sentence via unlawful committal.

- 17, paragraphs 1 and 2, because he was forced to answer questions by doctors and judges as a result of the unlawful committal. He also states that the State party continues to impugn his honour and reputation by claiming that he is mad and violent.

- 18, because he has been imprisoned on the basis that he has undesirable thoughts and because judges, psychiatrists and police have tried to coerce him into changing his beliefs.

- 19, because the State has tried to prevent him from holding opinions it did not like.

- 26, because he has been singled out for discrimination and has not been given equal protection under the law.

5.2 With regard to the State party's argument that part of his communication is inadmissible ratione temporis, the author recalls that the State party signed the Covenant in 1979, and that his complaints relate to events which started in 1983. He argues that the State party had a legal obligation to comply with the Covenant as from 1979. He further states that only one committal order was made in respect to him, which remained in force from 16 June 1984 to February 1993. When the Optional Protocol entered into force, he was still detained in the hospital's maximum security detention, and no new committal order was issued.

5.3 The author rejects the State party's argument that he has not substantiated his claims and submits that the evidence is overwhelming.

5.4 With regard to the State party's argument that he has not appealed the decision of the Complaints Tribunal, the author states that he did not appeal because he did not have money to pay for a lawyer, and because the courts in New Zealand do not follow proper and fair procedures.

5.5 The author maintains that the decision by Greig J to suppress publication of the proceedings was clearly intended to cover up his unlawful imprisonment. In this context, the author states that around the same time the hospital authorities did not allow him to send any mail outside or to make any phone calls.

5.6 The author rejects the State party's claim that he was detained for treatment, and states that he never required any medication. He submits that for the last five years he has refused any medication or any contact with psychiatric services and he has still not committed any serious offence. He claims that the State party's submissions are part of a propaganda campaign against him. He maintains that his committal was unlawful, and that despite opinions by psychiatrists that he should not remain committed, he was not discharged, because the authorities wanted to cover up his unlawful imprisonment.

5.7 With respect to the refusal to give him access to all information, the author states that this is done because the information is so defamatory that it cannot be released.

5.8 The author rejects the State party's argument that his rehabilitation has been halted several times because he did not comply with the conditions. According to the author, his undertaking to comply was invalid in law for being made under duress while in unlawful detention.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that he was not allowed to leave the country in 1984 in violation of article 12 (2) and his claim that the order by Greig J in 1986 not to disclose information about the procedure constituted a violation of article 19, the Committee notes that, although the Covenant entered into force for New Zealand in 1979, the Optional Protocol entered into force only in 1989. Having taken note of the State party's objection ratione temporis against the admissibility of these claims based on the prior jurisprudence of the Committee, the Committee considers that it is precluded from examining these claims on the merits. This part of the communication is therefore inadmissible.

6.3 With regard to the State party's argument, however, that the author's complaint concerning the committal hearing of 1984 and further reviews is inadmissible ratione temporis, the Committee notes that these hearings resulted in the continued detention of the author under the Mental Health Act and thus have continuing effects which in themselves may constitute violations of the Covenant. This part of the communication is thus admissible.

6.4 With regard to the author's claim under article 19 of the Covenant, because he was not given access to all information held by the Police and the Ministry of Health, the Committee notes that the author has failed to appeal the decision by the Complaints Review Tribunal of March 1997. This claim is thus inadmissible under article 5, paragraph 2 (b), for failure to exhaust all available domestic remedies.

6.5 The Committee considers that the author's claims that his detention under the Mental Health Act constituted violations under articles 7, 10, 17, 18, 19 and 26 of the Covenant, have not been substantiated by the facts or the arguments presented by him. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 Concerning the author's claim that he is a victim of a violation of article 14, the Committee considers that this claim is inadmissible as being incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol.

6.7 The Committee finds the remaining claims admissible and proceeds without delay to a consideration of the merits of the communication.

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The main issue before the Committee is whether the author's detention under the Mental Health Act from 1984 to 1993 constituted a violation of the Covenant, in particular of article 9. The Committee notes that the author's assessment under the Mental Health Act followed threatening and aggressive behaviour on the author's part, and that the committal order was issued according to law, based on an opinion of three psychiatrists. Further, a panel of psychiatrists continued to review the author's situation periodically. The Committee is therefore of the opinion that the deprivation of the author's liberty was neither unlawful nor arbitrary and thus not in violation of article 9, paragraph 1, of the Covenant.

7.3 The Committee further notes that the author's continued detention was regularly reviewed by the Courts and that the facts of the communication thus do not disclose a violation of article 9, paragraph 4, of the Covenant. In this context, the Committee has noted the author's argument that the decision by Unwin J not to dismiss him from compulsory status was arbitrary. The Committee observes, however, that this decision and the author's continued detention were reviewed by other courts, which confirmed Unwin J's findings and the necessity of continuation of compulsory status for the author. The Committee refers to its constant jurisprudence, that it is for the courts of States parties concerned to review the evaluation of the facts as well as the application of the law in a particular case, and not for the Committee, unless the Courts' decisions are manifestly arbitrary or amount to a denial of justice. On the basis of the material before it, the Committee finds that the Courts' reviews of the author's compulsory status under the Mental Health Act did not suffer from such defects.

7.4 As a consequence of the above findings, the author's claim under article 9, paragraph 5, is without merit.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Fausto Pocar and Martin Scheinin
(partly dissenting)

We associate ourselves with the general points of departure taken by the Committee. Treatment in a psychiatric institution against the will of the patient is a form of deprivation of liberty that falls under the terms of article 9 of the Covenant. In an individual case there might well be a legitimate ground for such detention, and domestic law should prescribe both the criteria and procedures for assigning a person to compulsory psychiatric treatment. As a consequence, such treatment can be seen as a legitimate deprivation of liberty under the terms of article 9, paragraph 1.

The special nature of compulsory psychiatric treatment as a form of deprivation of liberty lies in the fact that the treatment is legitimate only as long as the medical criteria necessitating it exist. In order to avoid compulsory psychiatric treatment from becoming arbitrary detention prohibited by article 9, paragraph 1, there must be a system of mandatory and periodic review of the medical-scientific grounds for continuing the detention.

In the present case we are satisfied that the law of New Zealand, as applied in the case, met with the requirements of article 9, paragraph 1. The author was subject to a system of periodic expert review by a board of psychiatrists. Although the periodicity of one year appears to be rather infrequent, the facts of the case do not support a conclusion that this in itself resulted in a violation of the Covenant.

Our concern lies in the fact that although there was periodic expert review of the author's status, his continued detention was not subject to effective and regular judicial review. In order for the author's treatment to meet the requirements of article 9, paragraph 4, not only the psychiatric review but also its judicial control should have been regular.

We find a violation of article 9, paragraph 4, in the case. Various mechanisms of judicial review on the lawfulness of the author's continued detention were provided by the law of New Zealand, but none of them was effective enough to provide for judicial review "without delay". Although there were several instances of judicial review, they were too irregular and too slow to meet the requirements of the Covenant. As the following account of the various instances of judicial review will show, this conclusion does not depend on the position one takes on the effect of the entry into force of the Optional Protocol in respect of New Zealand on 26 August 1989.

Between the original committal to compulsory psychiatric treatment in November 1984 and the decision by the Medical Health Review Tribunal, in February 1993 to discharge the author from compulsory status (before which decision he had already been released from a closed institution), there appears not to have been a single instance of judicial review that would have met the standards of article 9, paragraph 4, of the Covenant.

On 9 August 1985, the author submitted a writ of habeas corpus. Instead of resulting in a decision without delay, this writ was incorporated into another procedure of judicial review that ended in the judicial determination of the author's continued detention as late as 21 April 1986.

Another set of judicial proceedings to review the author's detention was initiated by the author in early December 1987. Although the author himself contributed to the delay by, inter alia, escaping from an institution, he was rearrested on 9 August 1989, after which date it took still until 15 August 1990 before the proceedings ended in a judicial determination by the High Court.

A third set of judicial proceedings were completed by a High Court Decision on 24 April 1991. It is unclear from the file when the proceedings in question were initiated, but from the decision itself it transpires that the review was based on "an urgent enquiry" by the author and that a hearing had been conducted on 22 February 1991, i.e. a little more than two months prior to the decision.

Further judicial decisions on the author's compulsory status were made on 5 August 1992 and 19 February 1993. As the author at the time of these decisions had already been released into his community on a temporary basis, they are not of direct relevance for the legal issue under article 9 of the Covenant. It deserves, however, to be mentioned that the last-mentioned decision by the Medical Health Review Tribunal was based on the Mental Health (Compulsory Assessment and Treatment) Act of 1992 and that it was initiated by an application by the author received on 9 February 1993. This appears to us as the only set of proceedings in the author's case that complies with the requirement of a judicial decision "without delay", prescribed in article 9, paragraph 4, of the Covenant.

Our conclusion of a violation by New Zealand of the author's rights under article 9, paragraph 4, is based on the fact that prior to the author's provisional release in April 1992, the author's requests for a judicial determination of the lawfulness of his detention were not decided without delay. Consequently, the author has a right to compensation under article 9, paragraph 5.

(Signed) Fausto Pocar

(Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

FF. Communication No. 768/1997, Mukunto v. Zambia (Views adopted on 23 July 1999, sixty-sixth session)*

Submitted by:	Chisala Mukunto
Alleged victim:	The author
State party:	Zambia
Date of communication:	1 February 1997
Date of decision on admissibility:	23 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Having concluded its consideration of communication No. 768/1997 submitted to the Human Rights Committee by Mr. Chisala Mukunto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Chisala Mukunto, a Zambian citizen. He claims to be a victim of a violation of his human rights by Zambia. Both, the International Covenant on Civil and Political Rights and its first Optional Protocol entered into force for Zambia on 10 April 1984.

The facts as submitted by the author

2.1 The author, who was born on 20 March 1942, was arrested on 2 August 1979, and kept in detention until he was charged, in April 1980, with the publication, possession and distribution of seditious publications. He was acquitted by the Magistrate Court on 12 December 1980 but continued to be illegally detained until 24 June 1981, when his release was ordered by the High Court upon his application for habeas corpus.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.2 In 1982, the author filed a petition for compensation for unlawful detention, ill-treatment and inhuman treatment.[126] The judge who was dealing with the case, died in 1986. The case was then transferred to another judge, who also died, in 1990, before delivering judgment. A hearing was scheduled to be heard on 31 July 1991 before a new judge. The author states that at the hearing, he was informed by the judge that he was not ready to proceed and that he would be informed about a date for a hearing. According to the author, he has never heard anything since.

The complaint

3. The author contends that the State party, by denying him a hearing of his claim for compensation, continues its previous violation of articles 7, 9, 10, 14, 19 and 26.

State party's submission and author's comments thereon

4.1 By submission dated 9 April 1998, the State party contends that the circumstances under which the author claimed compensation for his illegal detention in 1979 have been superseded by his claim for compensation for the conditions of his second detention in 1987.

4.2 The State party further argues that "the non-delivery of judgement in the case at hand was not out of design but due to circumstances beyond the control of the State party, as already referred by the author, the Judge seized of the matter died before he could deliver judgment, which called for the relocation of the matter, this was done". It further points out that while the matter was still subjudice, the author was detained under a presidential detention order dated 24 February 1987 allegedly for harbouring an escapee from lawful custody.

4.3 The State party contends that the author brought out a constitutional petition to the High Court to obtain his liberty and damages (for his second detention of 1987). Since he was not totally successful in his petition he appealed the decision of the High Court to the Supreme Court. The State party relies on this decision of the Supreme Court to contend that there has been no breach of the Covenant in respect to the author's alleged ill-treatment while in detention. It further contends that since this judgment covers conditions of detention (1987) the author's claim for damages for the conditions of his detention in 1979 have been subsumed into the current case. The State party holds that due to its economic constraints it can not be held accountable for the conditions of detention the author suffered since these were common to all prisoners and the author was not specifically singled out.

5. The author in a letter dated 18 May 1998, contests the State party's attempt to confuse both cases, and reiterates his claim that his case for compensation for the illegal detention he suffered in 1979, has been unduly prolonged, consequently he has been denied access to court, in violation of article 14, paragraph 1, of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained as required under article 5, paragraph 2 (a), of the Optional Protocol that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that the State party has not raised objections to the admissibility of the communication. Notwithstanding this, the Committee itself must verify if a communication complies with the admissibility criteria. In this respect and even though the State party has not raised the issue the Committee considers that it is precluded ratione temporis from considering the author's allegations in respect of the actual illegal detention from 1979 to 1981, since the Covenant only came into force for Zambia on 10 April 1984. Consequently, the claim under articles 7, 9, 10, 19 and 26 of the Covenant are inadmissible. The Committee decides that the rest of the case is admissible and proceeds, without further delay, to an examination of the substance of the author's claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

6.4 With regard to the author's claim that he has been denied access to court to claim compensation for the illegal detention he suffered in 1979, the Committee notes that the author filed a complaint for compensation before the Supreme Court in 1982 and 1985. The author's claim relates to his rights and obligations in a suit at law and therefore falls within the ambit of article 14, paragraph 1, of the Covenant. It is now 1999 and the author's case still has not been adjudicated on. Neither the author's claim nor the facts of the case have been refuted by the State party, which instead has put forward reasons for the non payment of compensation for the detention the author suffered in 1987 including alleged economic difficulties to provide adequate conditions to all detained persons. It is the Committee's reiterated jurisprudence that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe.[127] In this respect, the Committee considers that the author's rights under article 14 of the Covenant have not been respected.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 14, paragraph 1, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Mukunto with an effective remedy, entailing compensation for the undue delay in deciding his compensation claim for the illegal detention he suffered in 1979. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken in connection with the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

GG. Communication No. 775/1997, Brown v. Jamaica (Views adopted on 23 March 1999, sixty-fifth session)*

Submitted by:	Christopher Brown (represented by Allen and Overy, a law firm in London)
Victim:	The author
State party:	Jamaica
Date of communication:	17 November 1997 (initial submission)
Date of decision on admissibility:	23 March 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1999,

Having concluded its consideration of communication No.775/1997 submitted to the Human Rights Committee by Mr. Christopher Brown, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Christopher Brown, a Jamaican citizen, currently awaiting execution at St. Catherine District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7; 9, paragraphs 2 and 3; 10, paragraph 1; and 14, paragraphs 3 (a), (b), (c), (d) and (e) and 5, of the International Covenant on Civil and Political Rights. He is represented by counsel from the London law firm of Allen & Overy.

The facts as submitted by the author

2.1 On 28 October 1993, the author was convicted for the murder, on 16 October 1991, of one Alvin Smith and sentenced to death. His appeal against conviction was upheld by the Court of Appeal of Jamaica and a re-trial was ordered, on 18 July 1994. On 23 February 1996 he was convicted of capital murder after a re-trial. On 19 November 1996 his appeal against conviction was heard by the Court of Appeal of Jamaica and dismissed on 16 December 1996. On 23 October 1997, the author's petition for Special Leave to Appeal to the Judicial Committee of the Privy Council was dismissed.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen,

2.2 It is stated by counsel that, in practice, constitutional remedies are not available to the author because he is indigent and Jamaica does not make legal aid available for constitutional motions. Counsel submits therefore that all domestic remedies have been exhausted for purposes of article 5, paragraph 2(b) of the Optional Protocol.

2.3 It appear from the trial documents that the case for the prosecution was based on various testimonies, including a statement made by the author when he was arrested. At trial, a neighbour of the deceased, Mrs. Sion Walters, stated that she heard the old lady who lived with the deceased "bawl out for murder". She stated that she and her tenant went to the deceased's premises and saw there the author, who spoke to them.

2.4 At trial, the deposition of Mr. Peter Williams was allowed into evidence. In the statement, Mr. Williams, who rented a room from the deceased, stated that he had found the deceased laying in a pool of blood in a passage between the main house and an out-kitchen. Williams had looked into the deceased's bedroom, found it ransacked, and noticed an inhaler on the bed. He found, in the deceased's wardrobe, a pair of shoes and some pants he had seen on the author the previous Sunday evening. He also saw another pair of pants and shoes which were covered in blood.

2.5 One John Wiles testified that he had bought a video recorder (VCR) from the author and another man in October 1991 for $ 2000. Peter Williams identified the VCR as belonging to the deceased. When the police enquired after the VCR, Wiles accompanied them to the police station where he identified the author as the person who together with another man had sold it to him. He said he recognized the author from the neighbourhood but did not know his name.

2.6 Detective Sergeant Davis, the investigating officer testified that, on 16 October 1991, he had visited the scene of the crime, spoken to the two ladies next door and arranged for the body of the deceased, the crime scene and the motorcar parked outside the house to be photographed and dusted for finger prints. He took various exhibits to be examined by the forensic laboratory. On 15 November 1991 he saw the author at Patrick Garden Police Station where he informed him that he was investigating the murder of Alvin Smith and that he had a warrant for his arrest. Once cautioned the author responded: "yes, sah, a true but a Gary and Rohan mek and me do it. Sorry, sah, because his did good to me and me will give you a statement in how whole thing go".

2.7 According to Sergeant Davis' evidence, he asked the author In the presence of a Justice of the Peace, Mr. Thompson Beckford, if he wished to make a written statement or if he wanted someone to write it for him. Detective Davis wrote the words of caution, explained them to the author and wrote down his statement. In the statement the author admitted that he was part of a plan to rob the deceased, who was his former landlord. However, he denied killing Smith and implicated Rohan and Gray. He admitted to aiding in the murder by holding the deceased while he was assaulted and by giving Gray the machete with which the deceased was killed. He also admitted preventing the deceased from escaping. He further admitted that he had robbed two rings from the deceased's fingers, that he and Gray returned to the house to change their clothes, and that they had sold the video recorder to a youth

2.8 At the trial, a voir dire was conducted in order to establish the admissibility of the statement into evidence. Mr. Beckford corroborated the Sergeant's testimony and said that he witnessed the author dictating his statement and that he did not witness any ill-treatment.

2.9 The case for the defence was based on alibi. In an unsworn statement from the dock the author claimed to have left the neighbourhood on 13 October 1991 going to his sister's house at St Thomas and returning in November. He said that he was arrested and taken to Almond Town Police Station where his fingerprints were taken and where he allegedly refused to give a statement since he knew nothing of the murder. He stated that he was beaten into signing the statement; that he never saw the Justice of Peace and that he was identified by someone he did not know in respect of the sale of the video recorder.

The complaint

3.1 The author alleges violations of article 9, paragraph 2, and article 14, paragraph 3(a), of the Covenant, on the ground that he was arrested on 15 November 1991 and was held in custody for over two weeks before being charged. It is stated that during this period he was denied access to relatives or friends, nor was he given access to a lawyer.

3.2 The author claims that after having been detained at Almond Town police station for over two weeks, he was taken to Patrick Gardens Police Station for one day, where he was beaten, after which he suffered an asthma attack. He claims that he was induced into signing the caution statement with promises of medical attention. He further complains about the conditions of pre-trial detention in the different prisons. It is alleged that despite suffering from asthma he was made to sleep, in some instances on a cold concrete floor without a mattress, in others in an extremely hot cell where his asthma worsened. At the General Penitentiary, he was remanded at the hospital section of the prison.

3.3 Counsel invokes article 14, paragraph 3 (b) and (d), of the Covenant and submits that the author did not receive legal advice or representation from the date of his arrest, on 15 November 1991, to the preliminary examination on 8 June 1992. He did not realise he had the right to ask for a lawyer and accordingly did not request one. It is submitted that the author's representative at the preliminary hearing was absent for much of the hearing and that the author only met with his lawyer at the first trial once his trial had started. At the retrial the author was represented by a new attorney, who only visited him once in prison. It is stated that an application for an adjournment was refused by the trial judge. The author never met with the attorney who represented him on the second appeal. Counsel submits that even on the scarce occasions when the author met his lawyers he was hindered in his communication with them as prison officers were always present.

3.4 Counsel further alleges that defence counsel's behaviour was so incompetent as to constitute a denial of the author's right to have adequate legal representation, in violation of article 14, paragraph 3 (d). In this context, it is submitted that counsel failed to obtain crucial evidence and did not cross-examine the prosecution witnesses properly, failed to call defence witnesses and was absent during most of the judge's summing-up.

3.5 The trial judge is further said to have erred in dealing with the non disclosure of fingerprint evidence. Finally, it is argued that the judge's directions to the jury with regard to the voluntariness of the author's caution

3.6 The author complains that his retrial took place late in February of 1996, some 4 years and 3 months after his arrest on 15 November 1991. His appeal to the Jamaican Court of Appeal was heard in November of 1996 and dismissed in December. His petition for leave to appeal to the Privy Council was dismissed on 23 October 1997. The process from arrest to the final dismissal of his application for leave to appeal has taken almost 6 years. Counsel claims that this is a violation of articles 9, paragraph 3, and 14, paragraphs 3 (c) and 5.

3.7 At the time of submission, the author had spent 9 months on death row following his first conviction, and one year and nine months following the conviction after his retrial. This is said to constitute a violation of articles 7 and 10, paragraph 1, of the Covenant. In this respect, counsel states that this period cannot be disassociated from the full period of time the author has spent in prison, since from the day he was charged for murder, he has suffered the agony of knowing that if convicted he could be executed.

3.8 Counsel claims that the conditions of the author's detention on death row render his execution unlawful, and his execution would amount to a violation of articles 5 and 6 of the Covenant. In this context, he submits that detention may become unlawful through executive action, although it may initially have been lawful. This may occur if either the detention is too prolonged (i.e violation of article 9, paragraph 3, or 14 paragraph 3 (c)) or if the conditions of detention fall below minimum standards (i.e violation of articles 7 and 10, paragraph 1). In this respect, counsel refers to Pratt and Morgan as an authority for the proposition that carrying out a sentence of death can be rendered unlawful where the subsequent conditions in which a condemned man is held, either in terms of time or in terms of physical discomfort, constitute inhuman and degrading treatment or punishment.

3.9 In March of 1997, while on death row at St. Catherine's District Prison, the author's belongings were destroyed by the wardens in the contexts of a search exercise carried out following an escape bid made by other prisoners. The author's asthma pump and other medication were destroyed, and despite numerous complaints to the prison authorities these have not been replaced. Moreover, the author states that he has suffered repeated asthma attacks since his arrival at St. Catherine's prison and he complains that the warders have been slow in responding to his requests for assistance, have refused to take him to hospital and on some occasions have denied medication. In particular, it is alleged that the author has not received an inhaler and a pump, despite a prescription by the prison doctor. The above is said to constitute a violation of articles 7 and 10 paragraph 1 of the Covenant.

3.10 Counsel refers to the documentary evidence provided by non governmental sources, in respect of the general conditions of detention at St. Catherine's District Prison. The author's specific conditions of detention are said to be that he spends 23 hours per day locked up in his cell; with no mattress or other bedding, having to sleep on a concrete block; no adequate sanitation or ventilation; no electric lighting; he is denied exercise, association and activity as well as medical treatment and medication and appropriate psychiatric treatment as well as adequate nutrition and clean drinking water. Furthermore, there are no adequate procedures to address prisoners' complaints. The author has had no response to his complaint to the Jamaican Prisons Ombudsman. The conditions under which the author is detained at St. Catherine District Prison are said to amount to cruel, inhuman and degrading treatment within the meaning of articles 7 and 10, paragraph 1, of the Covenant.

3.11 It is further argued that a mandatory sentence of death for capital murder, which does not allow for any discretion on the part of the judge in evaluating possible mitigating circumstances is arbitrary and a disproportionate punishment which cannot be justified in law and contrary to articles 6, paragraph 1, 7, 10 and 14, paragraph 1, of the Covenant.

3.12 It is stated that the case has not been submitted to another procedure of international investigation or settlement.

State party's observations and author's comments

4.1 By submission of 13 January 1998, the State party responds to the merits of the communication.

4.2 The State party denies that the author was kept in detention for over two weeks before being charged. It asserts that the author was informed about the reasons for his arrest, at the time he was detained.

4.3 With regard to the author's complaints about his representation at trial, appeal, re-trial and appeal, the State party notes that he was represented by different counsel on each occasion. The State party maintains that it is its obligation under the Covenant to ensure that competent counsel is appointed to represent accused persons, and that it should not by act or omission obstruct counsel in the conduct of the case. The State party denies, however, that it is responsible for the way counsel conducts the case.

4.4 With respect to the author's complaint about the judge's directions to the jury, the State party recalls the Committee's jurisprudence that this is a matter for the appellate courts. According to the State party, the issue has been effectively examined by the Court of Appeal and it is thus not a matter suitable for the Committee's consideration.

4.5 With regard to the author's claim that there has been undue delay, since his retrial took place four years and three months after his arrest, the State party explains that this period encompasses the author's first trial, the hearing of his appeal and the ordering of the retrial. The State party notes that the first trial against the author began one year and eleven months after his arrest and that a preliminary enquiry was held in that period. The period between the author's conviction and the hearing of his appeal was nine months, and the retrial against the author began one year and seven months after the Court of Appeal's decision. The author's appeal against his conviction after the retrial was heard after nine months. In the circumstances, the State party denies that the delays are undue and constitute a violation of the Covenant.

4.6 With regard to the author's claim that the time he has spent on death row constitutes a violation of articles 7 and 10 of the Covenant, the State party argues that a delay of two years and six months on death row while the judicial process runs its course cannot be said to amount to cruel and inhuman treatment contrary to the Covenant.

4.7 With regard to the author's complaint about the lack of medical treatment for his asthma, the State party notes that the author has received treatment for his condition, but states that it will investigate this allegation further.

5.1 In his comments on the State party's submission, counsel notes that the State party has not made any investigation into the circumstances surrounding the author's detention and that it has offered no [illegible] submission as to the period of time he was detained without being formally charged after his arrest. In respect of the State party's affirmation that the author was informed of the reasons for his arrest at the time of his detention, counsel states that he will verify this with the author, but argues that the requirement that a person is promptly informed of any charges against him requires more than that a person is simply informed of the reasons for his arrest. Counsel refers to the Committee's jurisprudence and argues that it is the period of detention and formal charging which should be considered. Counsel claims that a period of two weeks without being formally charged is excessive and a clear breach of article 9, paragraph 2. He moreover draws to the Committee's attention the fact that the author was denied access to a lawyer and contact with his family in the period following his arrest.

5.2 With regard to the State party's argument that it cannot be held responsible for the manner in which counsel conducted the case for the author, the author notes that according to the Committee's jurisprudence the State party is under obligation to take measures to ensure that counsel, once appointed, provide effective representation in the interests of justice. Counsel claims that the State party has failed to demonstrate that it has taken any measures to ensure effective representation. He further refers to the trial transcript and claims that it is clear that his counsel was flagrantly incompetent, preventing a meaningful defence being put forward to the jury.

5.3 Counsel maintains that the judge's directions to the jury and the holding of the voir dire show that the trial suffered from irregularities prejudicing the author's right to a fair trial, in violation of article 14, paragraph 3(b) and (d).

5.4 As to the delay in proceedings, counsel submits that the period between arrest and trial should be taken as a whole and that a period of four years and three months is excessive and in violation of articles 9, paragraph 3, and 14, paragraphs 3(c) and 5. Furthermore, counsel argues that the delay of 23 months between the author's arrest and the first trial in itself constitutes undue delay, in the absence of a satisfactory explanation by the State party.

5.5 With regard to the period of detention on death row, counsel notes that the author first spent nine months on death row after his first conviction, and then was removed after the Court of Appeal ordered a retrial. He was subsequently returned to death row, after his retrial. Counsel claims that this alternation between hope and despair has imposed extreme mental suffering on the author.

5.6 Counsel notes that the State party has not addressed the author's complaint about the conditions of his detention.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has not raised any objections to the admissibility of the communication, and that it has addressed the merits of the case. In the circumstances, the Committee finds that no obstacles to admissibility exist and proceeds immediately to the examination of the merits of the communication, in the light of all the written information made available to it by the parties.

6.3 The author has claimed that he was kept in detention for over two weeks before he was formally charged, whereas the State party has stated that the author was informed immediately upon arrest of the reasons for his arrest. The Committee notes that it appears from the trial transcript that the author was informed about the charges against him shortly after his arrest. Accordingly, the facts before the Committee do not show a violation of the Covenant in this respect. It is not clear from the information before the Committee when the author was first brought before a judge or other officer authorized by law to exercise judicial power. In the absence of any concrete claim in this respect, the Committee is not in a position to make a finding whether or not article 9, paragraph 3, of the Covenant was complied with in the author's case.

6.4 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant, because the author was maltreated by the police upon his arrest, the Committee notes that the issue was subject of a voir dire and that it was before the jury during the trial, that the jury rejected the author's allegations, and that the matter was not raised on appeal. The Committee finds that the information before it does not justify the finding of a violation of articles 7 and 10, paragraph 1, of the Covenant in this respect.

6.5 On the other hand, the author has made specific complaints about the circumstances of his pre-trial detention which have not been addressed by the State party. In the circumstances, due weight must be given to the author's allegations to the extent that they are substantiated. The Committee finds that the circumstances of the author's pre-trial detention, as described by the author and taking into account that he suffered an asthmatic condition, constitute a violation of article 10, paragraph 1, of the Covenant.

6.6 With regard to the author's representation at the preliminary hearing, the Committee notes that it appears from the trial transcript that the author's representative was absent during the deposition of two prosecution witnesses at the preliminary hearing on 8 June 1992, and that the magistrate continued the hearing of the witnesses and only adjourned when the author indicated that he did not wish to cross-examine the witnesses himself. The cross-examination was then adjourned to 17 June 1992, and, in the absence of the lawyer, again to 7 July 1992. After the adjournment of 17 June 1992, the judge appointed new counsel for the author, who however declined to cross-examine the witnesses. The Committee refers to its jurisprudence that it is axiomatic that legal assistance be available at all stages of criminal proceedings, particularly in capital cases.[128] In the present case, the Committee is of the opinion that the magistrate, when aware of the absence of the author's defence counsel, should not have proceeded with the deposition of the witnesses without allowing the author an opportunity to ensure the presence of his counsel. The Committee is of the opinion that the facts before it disclose a violation of article 14, paragraph 3 (d), of the Covenant.

6.7 The author has further claimed that he did not have enough time in order to prepare for his defence at the retrial and that an adjournment was refused by the trial judge. It appears from the transcript of the trial, that an adjournment was granted by the judge on 12 February 1996, in order to give counsel the opportunity to interview his client. However, on 13 February 1996, counsel requested a further adjournment since he had not met yet with the author. It further appears that counsel was assigned to the author's defence in October 1994, and that he had requested an adjournment of the trial on several occasions, apparently because he was seeking copies of certain documents in possession of the Prosecution. He met

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with his client for the first time in May 1995. In the circumstances, the Committee finds that the facts before it do not show that the State party has violated the author's right, pursuant to article 14, paragraph 3(b), of the Covenant to have adequate facilities for the preparation of his defence.

6.8 Nevertheless, the Committee recalls its jurisprudence that the State party should ensure that counsel once assigned, provide effective representation of the accused. The Committee considers that it should have been apparent to the trial judge that counsel was not providing effective representation of the accused, at the latest when he noticed that counsel was absent when he started his summing-up. Consequently, article 14, paragraph 3(d), has been violated in the author's case.

6.9 With regard to the author's claim that his appeal counsel never consulted with him before the hearing of the appeal, the Committee notes that a legal representative was assigned by the State party to represent the author, that counsel did argue grounds for appeal and that the Court of Appeal heard the appeal. The Committee refers to its jurisprudence that a State party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[129] In the circumstances, the Committee finds that the facts before it do not reveal a violation of the Covenant in this respect.

6.10 Counsel has also claimed that the judge's instructions to the jury amounted to a denial of justice, in violation of article 14, paragraph 1, of the Covenant. The Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate Courts of States parties, to review the instructions to the jury by the trial judge, unless it can be ascertained that they were manifestly arbitrary or amounted to a denial of justice. The material before the Committee does not show that the trial suffered from such defects. Accordingly, the Committee concludes that there has been no violation of the Covenant in this respect.

6.11 The author has complained about the length of the criminal procedure in his case, and the State party has explained that the delay was caused by the ordering of a retrial. The Committee notes that the author was arrested on 15 November 1991, and that the first trial against him occurred in October 1993, 23 months after his arrest. The Committee finds that, in the absence of a satisfactory explanation by the State party, a delay of 23 months in bringing the author to trial, considering that he was kept in detention, constitutes, in the circumstances of the instant case, a violation of the right contained in article 9, paragraph 3, of the Covenant to be entitled to trial within reasonable time or release, as well as of article 14, paragraph 3 (c). In respect to the alleged other delays in the criminal process, the Committee notes that the author's retrial was scheduled to begin on 23 November 1994, four months after the Court of Appeal's judgement, but that it was adjourned on several occasions upon request of the defence. In the circumstances, the Committee finds that the delay of one year and nine months between the Court of Appeal's judgement and the beginning of the retrial cannot be solely attributed to the State party and that it does not disclose a violation of the Covenant.

6.12 With regard to counsel's argument that the author's detention on death row constitutes cruel and inhuman treatment, in particular because he was moved away from death row after nine months, only to be returned after a year and nine months,

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after his retrial, the Committee refers to its jurisprudence[130] that detention on death row for a specific period of time does not per se violate the Covenant, in the absence of further compelling circumstances. The Committee does not consider the fact that the author was placed back on death row after his retrial a compelling circumstance which would render the detention on death row cruel or inhuman. The Committee is thus of the opinion that the period of the author's detention on death row as of itself does not constitute a violation of the Covenant.

6.13 The author has, however, also complained about the circumstances of his detention at St. Catherine's District Prison, which have not been addressed by the State party. In particular, he has stated that he is locked up in his cell for 23 hours a day, that he has no mattress or other bedding, no adequate sanitation, ventilation or electric lighting, and that he is denied exercise as well as medical treatment, adequate nutrition and clean drinking water. The author has also claimed that his belongings, including an asthma pump and other medication, were destroyed by the warders in March 1997, and that he has been denied prompt assistance in case of an asthma-attack. Although the State party has promised to investigate certain of these claims, the Committee notes with concern that the results of the State party's investigation have never been communicated. In the circumstances, due weight must be given to the author's uncontested allegations to the extent that they are substantiated. The Committee finds that the above constitute violations of articles 7 and 10, paragraph 1, of the Covenant.

6.14 With regard to counsel's argument that the mandatory death sentence for capital murder is an arbitrary and disproportionate punishment, and in violation of the Covenant, the Committee notes that Jamaican law distinguishes between non-capital and capital murder, and that capital murder is murder committed under aggravated circumstances. The Committee is therefore of the opinion that counsel's argument is without foundation, and that the facts before it do not reveal any violation of the Covenant in this respect. Moreover, the Committee considers that counsel has failed to advance any arguments which mitigating circumstances might have been taken into account by the judge when sentencing the author, and how the author would therefore have been affected by the alleged violation.

6.15 The Committee considers that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant if no further appeal against the death sentence is possible. In Mr. Brown's case, the final sentence of death was passed without having met the requirements for a fair trial as set out in article 14 of the Covenant. It must therefore be concluded that the right protected under article 6 has also been violated.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose violations of articles 7, 9, paragraph 3, 10, paragraph 1, 14, paragraph 3 (c) and (d), and consequently 6, of the Covenant.

8. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Christopher Brown with an effective remedy, including either a retrial in compliance with all guarantees under article 14 or release, as well as immediate commutation and compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

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9. On becoming a State party to the Optional protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Hipólito Solari Yrigoyen

(partly dissenting)

I hold a dissenting opinion on paragraph 6.12, which in my opinion should read as follows:

6.12 The author's lawyer has maintained that his detention on death row constitutes cruel and inhuman treatment, both because of the time spent there and because of the general conditions of detention, which he has spelled out in paragraph 3.10. In this connection it should be pointed out that although, in accordance with the Committee's jurisprudence, time is not a factor which causes the detention to constitute a violation of the Covenant, this is not the case with conditions of detention. In the present case, the State party has not refuted the specific allegations about the treatment received by the author in breach of articles 7 and 10, paragraph 1, of the Covenant; it has simply ignored this point, despite the obligation imposed on it by article 4, paragraph 2, of the Optional Protocol. Moreover, in the present case, the State party has not fulfilled its obligation to indicate whether the prison regime and the treatment imposed on the detainee are in conformity with the provisions of article 10 of the Covenant. Because of these significant circumstances, the complaint should be upheld. The Committee considers that the author has been the victim of cruel treatment denying him the respect due to the inherent dignity of a human being, in breach of the provisions of the International Covenant on Civil and Political Rights already mentioned in this paragraph.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

HH. Communication No. 786/1997, Vos v. the Netherlands (Views adopted on 26 July 1999, sixty-sixth session)*

Submitted by: A. P. Johannes Vos

Alleged victim: The author

State party: The Netherlands

Date of communication: 22 July 1996

Date of decision on admissibility: 26 July 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1999,

Having concluded its consideration of communication No. 786/1997 submitted to the Human Rights Committee by Mr. A. P. Johannes Vos under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Antonius Petrus Johannes Vos, a married Dutch citizen born on 24 September 1919. He claims to be a victim of a violation by the Netherlands of article 26 of the Covenant.

The facts

2.1 On 24 September 1984, the author was awarded a pension under the Algemene Burgerlijke Pensioenswet (ABP, General Law on Civil Service Pensions).

2.2 In the Netherlands, civil servants are covered by both the ABP pension scheme and by the general pension scheme (AOW). The AOW pension is fixed by reference to the minimum wage and paid in full after 50 years' insurance. The ABP pension is equal to 70 per cent of the pensioner's last salary and is paid in full after 40 years of service.

2.3 Before 1985, a married man was entitled under the AOW to a general pension for a married couple equal to 100 per cent of the minimum wage. Unmarried persons of either sex were entitled to a general pension equal to 70 per cent of the minimum wage. A married woman had no entitlement in her own right. To prevent overlapping of the AOW pension and the ABP pension, the AOW pension was incorporated into the ABP pension, that is to say it was regarded as forming part of the ABP pension. In practice, the ABP deducted the amount of the general pension from the civil service pension. The maximum amount of general pension to be incorporated was 80 per cent (2 per cent for each year of service). For married women civil servants, the incorporation was calculated by reference to the amount of the general pension of an unmarried woman, and the deduction was thus a maximum of 80 per cent of 70 per cent of the minimum wage.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

2.4 On 1 April 1985, married women became entitled in their own right to a pension under the AOW. Married persons then received each a pension equal to 50 per cent of the minimum wage. The ABP scheme was amended accordingly, as of 1 January 1986. Between 1 April 1985 and 1 January 1986 a transitional scheme applied. As of 1 January 1986, pensions under the ABP are calculated in accordance with a "franchise" system, which is applied equally to men and women civil servants. However, for pension entitlements relating to periods of service before 1 January 1986 the old incorporation scheme continues to apply.

2.5 On 29 November 1990, following the publication of a decision of the Public Servants' Court (Ambtenarengerecht) of 28 February 1990 concerning a similar matter, the author filed a complaint against the incorporation of his general pension into his civil service pension as discriminatory. The decision on the author's complaint was deferred awaiting the outcome of the procedure in the similar case (Beune. v. ABP).

2.6 The Centrale Raad van Beroep (Central Council of Appeal, the highest court in these matters) asked the Court of Justice of the European Communities for a preliminary ruling on the calculation of the pension entitlements. By judgement C-7/93, of 28 September 1994, the Court held that the different calculations of the pensions awarded to married men and to married women were in violation of article 119 of the EEC Treaty. At the same time the Court held that only civil servants who had filed a claim under national law before 17 May 1990[131] could invoke the direct effect of article 119 for the purpose of requiring equality of treatment with regard to the payment of the ABP pensions. Following the Court's judgement, the Centrale Raad van Beroep on 16 February 1995 decided the case of Beune v. ABP accordingly, restricting compensation for discrimination in these matters to claims filed before 17 May 1990.

2.7 The author's complaint was subsequently dismissed on 12 June 1995, since he had submitted his claim on 29 November 1990, that is after the cutoff date established by the European Court. His request for revision was rejected on 30 June 1995. The District Court of The Hague rejected his appeal on 19 June 1996. The author did not appeal this decision to the Centrale Raad van Beroep, because of the high costs involved and counsel's opinion that a further appeal would have no chance of success in the light of the European Court's decision and the judgement by the Centrale Raad van Beroep of 16 February 1995.

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[131] The date is the date of the judgement by the Court of Justice of the European Communities in the Barber case (C-262/88). In the so-called Barber Protocol (Protocol No. 2 on Article 119 of the EEC Treaty) the member States of the European Union agreed that "benefits under occupational social security schemes shall not be considered as remuneration if and in so far as they are attributable to periods of employment prior to 17 May 1990", except in cases initiated before that date.

The complaint

3. The author, who is married, claims that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women is since 1 April 1985 (when married women became entitled to their own general pension) in violation of article 26 of the Covenant, and that the limitation of the remedy, as set out by the judgement of the European Court of Justice, is also discriminatory. The author submits that since 1 April 1985 he receives 50 per cent of a full AOW pension for married couples, but that, because his entitlement to a civil service pension dates from 1984, this pension is still, at present, calculated by incorporating 80 per cent of the full AOW pension, whereas the pension of married women civil servants is calculated by incorporating 80 per cent of half of the AOW pension. He thus receives a smaller pension from the ABP than female civil servants (pensioners) who are married.

State party's observations

4.1 By note of 16 March 1998, the State party challenges the admissibility of the communication for non-exhaustion of domestic remedies, since the author failed to appeal the judgement of the District Court to the Centrale Raad van Beroep. The State party also notes that the author based his case in the domestic proceedings on article 119 of the Treaty of the European Community, not on article 26 of the Covenant.

4.2 By submission of July 1998, the State party addresses the merits of the communication. It refers to the Committee's jurisprudence and states that the decisive question is whether a specific distinction is to be considered discriminatory. According to the State party, this is the case only when the parties concerned find themselves in a comparable situation and when the distinction is based on unreasonable and subjective criteria. The State party recalls that before 1 April 1985 married men and married women were not in a comparable situation with regard to the incorporation of the general pension in their civil service pension since married women had no entitlement in their own right to the general pension. The ABP scheme applied equally to married men and married women civil servants with regard to entitlement over periods of service after 1 January 1986.

4.3 According to the State party, the only period of time during which married men and married women were entitled to the same general pension, but had the incorporation into the civil service pension calculated differently, was between 1 April and 31 December 1985. The State party explains that this period of eight months was a transitional one, since the preparations for the introduction of new legislation had not yet been completed. For this reason and to achieve as fair a solution as possible, it was decided to equate married women civil servants with unmarried civil servants in respect of entitlements built up between 1 April 1985 and 31 December 1985. The State party is of the opinion that, in the particular circumstances, this does not constitute discrimination.

Author's comments

5.1 In his comments on the State party's observations, the author notes that his claim was rejected in the domestic proceedings on the basis of a recent judgement of the Centrale Raad van Beroep, and that a further appeal to the CRVB would have been futile. He also refers to his appeal of 7 August 1995 to the Court in which he refers not only to article 119 of the Treaty, but also in general to norms of non-discrimination and the Universal Declaration of Human Rights.

5.2 As to the merits, the author observes that the Court of Justice of the European Communities has decided that the different basis for calculation of the incorporation of the general pension into the civil service pension for married men and married women constitutes discrimination. He notes that his pension is still being calculated on this basis and that therefore the discrimination continues.

5.3 The author states that financial grounds cannot justify discrimination. The author requests the Committee to find that the limitation of the remedy established by the Court of Justice of the European Communities constitutes discrimination against him, and that the consequential failure of the Dutch authorities to remedy the situation also constitutes discrimination.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies. With regard to the State party's argument that the author failed to appeal to the Centrale Raad van Beroep, the Committee notes that the judgement of the District Court in the author's case followed a recent judgement by the Centrale Raad van Beroep in a similar case as the author's. In the circumstances, the Committee is of the opinion that an appeal to the Centrale Raad van Beroep was not an effective remedy for the author and the requirement of article 5(2)(b) therefore does not preclude the Committee from considering the present communication. With regard to the State party's argument that the author failed to invoke article 26 of the Covenant before the national courts, the Committee notes from the text of the author's appeal that he invoked general norms of non-discrimination, including the Universal Declaration of Human Rights. The Committee recalls its jurisprudence[132] that for purposes of article 5, paragraph 2(b) of the Optional Protocol the author has to invoke before the domestic instances the substantive right he claims to be violated, but that it is not necessary that he invoke the specific article of the Covenant in which the substantive right is embodied. The State party has not raised any other objections and accordingly the Committee finds the communication admissible and proceeds without delay to a consideration of its merits.

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The issue before the Committee is whether Mr. Vos is a victim of a violation of article 26, because the calculation of the incorporation of his general pension into his ABP pension is different for him as a married man than for married women, as a consequence of which he receives less pension than a married woman.

7.3 The Committee notes that the European Court of Justice has already decided that the difference in calculation is in violation of article 119 of the EEC Treaty, which prohibits any discrimination with regard to pay as between men and women.

7.4 The State party has explained that the difference in calculation of the pension is a leftover of the initial different treatment between married men and married women with regard to the general pension, which was abolished in 1985 by amending the general pension legislation. The Committee recalls its jurisprudence that, when a State party enacts legislation, such legislation must comply with article 26 of the Covenant. Once it equalled general pensions for married men and women, it would have been open to the State party to change the General Law on Civil Service Pensions (Algemene Burgerlijke Pensioenwet) in order to prevent the difference in calculation of civil service pensions for married men and married women who as of 1 April 1985 enjoyed equal rights to the general pension. The State party, however, failed to do so and as a result a married man with pension entitlements of before 1 January 1986 has a higher percentage of general pension deducted from his civil service pension than a married woman in the same position.

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[132] See, inter alia, the Committee's decision dated 30 March 1989 in case No. 273/1988 (B.d.B v. the Netherlands), para. 6.3.

7.5 The State party has argued that no discrimination has occurred since at the time when the author became entitled to a pension, married women and married men were not in a comparable position with regard to the general pension. The Committee notes, however, that the issue before it concerns the calculation of the pension as of 1 January 1986, and considers that the explanation forwarded by the State party does not justify the present difference in calculation of the pension of married men and married women with civil service pension entitlements of before 1986.

7.6 In this context, the Committee notes that the courts in the Netherlands, following the opinion by the European Court of Justice, have limited a remedy for the discrimination to those persons who filed their claim before 17 May 1990, in accordance with the law of the European Communities. The Committee observes that what is at issue in the instant communication under the Optional Protocol to the International Covenant on Civil and Political Rights is not the progressive implementation of the principle of equality between men and women with regard to pay and social security, but whether or not the application to the author of the relevant legislation was in compliance with article 26 of the Covenant. The pension paid to the author as a married male former civil servant whose pension accrued before 1985 is lower than the pension paid to a married female former civil servant whose pension accrued at the same date. In the Committee's view this amounts to a violation of article 26 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

9. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Vos with an effective remedy, including compensation. The State party is under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to translate and publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

II. Communication No. 800/1998, Thomas v. Jamaica (Views adopted on 8 April 1999, sixty-fifth session)*

Submitted by: Damian Thomas

Alleged victim: The author

State party: Jamaica

Date of communication: 16 August 1997 (initial submission)

Date of decision on admissibility: 8 April 1999

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 8 April 1999,

Having concluded its consideration of communication No.800/1998 submitted to the Human Rights Committee by Damian Thomas, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Damian Thomas, a Jamaican minor (16 years old at the time of submission of the communication), currently at St. Catherine's District Prison, Jamaica. The author was born on 21 November 1980. No articles of the Covenant are invoked, the communication appears to raise issues under articles 7, 10, and 14. He is not represented by counsel.

The facts as submitted by the author

2.1 The author was arrested on 9 May 1995 and convicted on 3 May 1996. On 5 May 1996 he was placed in the General Penitentiary, Kingston.[133]

2.2 By a further submission the author informed the Committee that he was 15 years old when he was arrested. He was brought before the Gun Court for two murders where only one of those allegations was sent to trial. He was tried before the Home Circuit Court, convicted and sentenced to be detained during her Majesty's pleasure.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of an individual opinion by Committee member Hipólito Solari Yrigoyen is appended to the present document

[133] A letter from several inmates at the General Penitentiary has been received, requesting that the Committee act on behalf of the author.

[Information in the communication is not sufficiently detailed to enable the Committee, at this stage, to consider any issue under article 14.]

The complaint

3. While at the General Penitentiary, the author wrote to the Commissioner for Prisons requesting that he be removed from the adult prison. It appears that someone within the prison system, one Mr. Dawkins, informed him that he was to be moved to a juvenile institution. However, when the author was moved it was to St. Catherine District Prison, once again among adults. The author claims that he is being held in a prison with adult inmates in violation of the Covenant.

State party's submission and author's comments thereon

4.1 By submission dated 23 March 1998, the State party contends that the circumstances under which the author is being held are not clear. It requests that the author provide information on the offence for which he was convicted, as well as any other relevant information, e.g how old was he at the time of his sentence and whether the judicial authorities were made aware of his age.

4.2 It undertakes to investigate the circumstances of the author's detention and would advise the Committee as soon as the results were available.

5.1 The author in a letter dated 11 May 1998, informed the Committee that he was tried at the Gun Court for two murders, that he lost his appeal, being sentenced to detention during her Majesty's pleasure. He informs the Committee that he was born on 21 November 1980, and was only 15 at the time of his arrest.

5.2 He further submits that since he has been in detention both at the General Penitentiary and at St. Catherine District Prison he has been systematically beaten by warders. He refers to several incidents; one on 8 November 1996, where he was kicked by several warders; Mr. Norris, Mr. Dwight and Sergeant Brown. On 20 March 1997 a warden called Mr. Waugh boxed him round the ears and threatened him. On 16 December 1997 he was thumped on the back and beaten by a Mr. Campbell and a corporal Ferguson while taking him to the overseer's office. They told the overseer that they were taking him to the hospital allegedly because he had lice. He was never taken to the hospital but rather he was beaten and kicked about by the wardens and a warden called Mr. Mcdermatt cut off his Rastafarian hair. On 20 July 1997, he was beaten by several warders including a Mr. Gardener allegedly because the author was from the same area where the warden's aunt had been killed.

5.3 These new allegations were transmitted to the State party with a request that any comments be submitted to the Committee before 30 January 1999, since the case would be put before the Committee at its 65th session. To date, 25 March 1999, no response has been received from the State party.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained as required under article 5 paragraph 2 (a) of the Optional Protocol that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the author's alleged ill-treatment at the General Penitentiary and St. Catherine District Prison, the Committee notes that the author has made precise allegations that he was brutalized by several wardens on 8 November 1996; 20 March 1997; 16 December 1997 and 20 July 1997. The Committee also notes that the author has complained to the prison authorities. His claims have not been refuted by the State party, which has promised to investigate these, but has failed to forward to the Committee its findings, eleven months after promising to do so, in spite of a reminder sent on 30 October 1998. The Committee recalls that a State party is under the obligation to investigate seriously allegations of violations of the Covenant made under the Optional Protocol. However, in the present case the Committee notes that these allegations were transmitted to the State party after Jamaica's denunciation of the Optional Protocol came into force on 23 January 1998. Consequently, the Committee considers that these claims are inadmissible under article 1 of the Optional Protocol.

6.4 With respect to the remaining allegations the Committee observes that the State party has not raised objections to the admissibility of the communication. It further observes that, given the name, date of birth, date of arrest and of conviction and the location in 1998 in St. Catherine's District Prison, all in relation to the author, the State party should have no difficult in identifying the details relevant to this matter. Accordingly the Committee decides that the remaining allegations are admissible and proceeds, without further delay, to an examination of the substance of the author claims, in the light of all the information made available to it by the parties, as required by article 5, paragraph 1 of the Optional Protocol.

6.5 With respect to the non segregation of the author from adult prisoners both at the General Penitentiary and at St. Catherine's District Prison, the Committee once again regrets the State party's lack of cooperation in this matter. The Committee considers that it is incumbent upon the State party where a complaint such as this is submitted to it in respect of a serving prisoner, to verify whether that prisoner is, or has at any relevant stage, been a minor. The Committee notes from the information before it and not refuted by the State party, that the author was born in November 1980, making him seventeen years old when his communication was submitted to the Committee and 15 when he was sentenced. The Committee considers that the State party has failed to discharge its obligations under the Covenant in respect of Damian Thomas, in so far as he has been kept among adult prisoners when still a minor, and consequently, finds that there has been a violation of article 10 paragraphs 2 and 3.

6.6 The Committee further observes that the facts as described in the present case, also constitute a violation of article 24 of the Covenant, since the State party has failed to provide to Damian Thomas such measures of protection as are required by his status as a minor.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 10, paragraphs 2 and 3, and 24 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Thomas with an effective remedy, entailing his placement in a juvenile institution, separated from adult prisoners

if Jamaican legislation authorises it, and including compensation his non segregation from adult prisoners while a minor. The State party is under an obligation to ensure that similar violations do not occur in the future.

9. On becoming a State party to the Optional Protocol, Jamaica recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not. This case was submitted for consideration before Jamaica's denunciation of the Optional Protocol became effective on 23 January 1998; in accordance with article 12(2) of the Optional Protocol it is subject to the continued application of the Optional Protocol. Pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Hipólito Solari Yrigoyen
(dissenting)

The following is the Committee member's version of how paragraph 6.4 of the decision should have read.

6.4 The author informed the Committee in a letter dated 11 May 1998 that he had been beaten on several occasions by warders in St. Catherine's District Prison, where he is detained. He indicated that those incidents occurred on 8 November 1996, 20 March 1997 and 20 July 1997. When the first occurred, the author was 16 years old, and when the other two occurred, he was 17; the fact that he was a minor imprisoned with adults is also an aggravating circumstance. Paragraph 5.2 contains a description of the events and identifies the responsible individuals. The Committee notes that the author's complaint was very specific and that he protested to the prison authorities. On 30 October 1998, the Committee informed the State party of the author's complaint that he had been beaten and mistreated. It promised to investigate, but as of 8 April 1999, when the Committee considered the communication in question, it had not replied in accordance with its obligations under article 4, paragraph 2 of the Optional Protocol.

Although the State party denounced the Optional Protocol, a measure which took effect on 23 January 1998, the events described in the author's complaint occurred before that date and are handled in the same manner as the original complaint. The terms of the Optional Protocol therefore continue to apply to the communication, as provided in article 12, paragraph 2 thereof. Nor has the State party fulfilled its obligation to inform the Committee of whether the prison regime and the treatment suffered by the person deprived of his liberty comply with the terms of article 10 of the Covenant. For all these reasons, the Committee considers that the treatment suffered by the author and the beatings he received in St. Catherine's District Prison constitute violations of article 10, paragraph 1 and article 7 of the Covenant.

(Signed) Hipólito Solari Yrigoyen

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

ANNEX XII

DECISIONS OF THE HUMAN RIGHTS COMMITTEE DECLARING COMMUNICATIONS INADMISSIBLE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

A. Communication No. 634/1995, Amore v. Jamaica (Decision adopted on 23 March 1999, sixty-fifth session)*

Submitted by:	Desmond Amore (represented by Denton Hall, a London law firm)
Alleged victim:	The author
State party:	Jamaica
Date of communication:	17 January 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Desmond Amore, a Jamaican citizen, who at the time of submission was awaiting execution at St. Catherine's District Prison, Jamaica. He claims to be a victim of violations by Jamaica of articles 7; 10, paragraph 1; 14, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. He is represented by the London law firm Denton Hall. On 16 May 1995, his sentence was commuted to life imprisonment.

The facts as submitted by the author

2.1 The author was convicted of the murder of one Christopher Jones and sentenced to death on 23 July 1987, by the Home Circuit Court, Jamaica. His appeal was refused by the Court of Appeal of Jamaica on 23 March 1988. On 15 March 1994, the author's Appeal to the Judicial Committee of the Privy Council was dismissed.

2.2 It is contended by counsel that a constitutional remedy is not available to the author in practice, due to his impecunious situation. Reference is made to the

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

Human Rights Committee's jurisprudence.[1] Counsel therefore submits that all domestic remedies have been exhausted for purposes of article 5, paragraph 2(b), of the Optional Protocol.

2.3 The author was arrested on 14 April 1986. After he was pointed out at an identification parade, the author was charged on 18 April 1986 with the murder of one Christopher Jones. At the trial, the case for the prosecution rested on the uncorroborated identification evidence of the sole eyewitness, one Angella Jones. She testified that on 3 October 1985, the house where she and her husband resided was broken into by the author. She claimed that the author, who was armed with a gun, ransacked their bedroom, threatened her and her husband, and proceeded to rape her; in the ensuing struggle, her husband, Christopher Jones, was shot in the chest. Angella Jones testified she had never seen the author before the incident on 3 October 1985, but that she had been able to see him clearly for more than five minutes, in the light of a fluorescent bedside lamp. On 18 April 1986, she attended an identification parade and picked out the author as being the intruder. She also made a dock identification of the author at his trial. The other prosecution evidence was that of a doctor describing the injuries he witnessed on the deceased. In addition, the police officers testified as to the discovery of the body and as to the parade, and the deceased's brother as to the identification of the body.

2.4 In an unsworn statement from the dock, the author denied being involved in the offence and said he knew nothing about it. His defence throughout the trial was that Angella Jones was mistaken as to her identification of him as the intruder. No other evidence was called in support of the author's case. The author was represented by a legal aid lawyer, who in cross-examining Angella Jones asked only one question pertaining to the identification evidence.

The complaint

3.1 The author claims that the directions by the trial judge to the jury were inadequate and did not meet the requirements of impartiality, and therefore amounted to a denial of justice in violation of article 14, paragraphs 1 and 2. On the importance of high standards as to thoroughness and impartiality of the judge's instructions in a capital case, counsel makes reference to the jurisprudence of the Human Rights Committee.[2]

3.2 Counsel submits that the trial judge erred fundamentally in failing to direct the jury explicitly that identification evidence is fraught with the risk of inculpating innocents, and that due to the vulnerability of visual evidence, honest witnesses can give inaccurate but convincing evidence. Counsel contends that by directing the jury that "the frankness of the witness is very important", the trial judge failed to emphasise the fact that the only issue was the correctness of the witness' identification of the author; the trial judge in effect rendered her directions nugatory by confusing honesty with accuracy. Counsel further contends that the trial judge failed to properly direct the jury that there was no evidence to confirm or support the accuracy of Angella Jones' evidence of identification, or to warn that the evidence before them could mistakenly be regarded as confirming or supporting the accuracy of her identification. Furthermore, counsel submits that the trial judge's analysis of Angella Jones' evidence was inadequate as she failed to analyse the absence of any description of physical features of the intruder in the evidence, or what in particular made his appearance memorable and identifiable to the witness.

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[1] Communication No. 445/1991 (Lynden Champagnie, Delroy Palmer and Oswald Chisholm v. Jamaica), Views adopted on 18 July 1994.

[2] Communication No. 232/1987 (Daniel Pinto v. Trinidad and Tobago), Views adopted on 20 July 1990.

3.3 Counsel submits that the "agony of suspense" resulting from the author's incarceration on death row from his sentencing on 23 July 1987 to the commutation in May 1996 amounted to cruel, inhuman and degrading treatment, in violation of article 7. Reference is made to the jurisprudence of the Judicial Committee of the Privy Council[3] in support of this view.

3.4 Counsel further claims that the conditions of the prison regime of St. Catherine's District Prison, which he notes are well documented in reports by Americas Watch and Amnesty International, constitute a breach of article 10, paragraph 1, of the Covenant.

State party's comments and counsel's observations thereon

4.1 In its submission of 29 April 1996, the State party comments on the author's claims of violations of articles 7, 10 and 14 of the Covenant. The State party states that its comments are made both in regard of the admissibility and the merits of the case, but it does not explicitly contest the admissibility of the communication.

4.2 With respect to the alleged violation of articles 7 and 10, paragraph 1, of the Covenant on the ground of "agony of suspense" suffered by the author due to the delay of execution, the State party submits that a prolonged stay on death row does not per se constitute a cruel and inhuman treatment.

4.3 With respect to the alleged violation of the right to a fair trial, as provided for in article 14 of the Covenant, the State party submits that the trial judge's directions to the jury on the issues of identification and reasonable doubt, are matters which fall outside the Committee's jurisdiction. It is submitted that the exceptions to this principle, i.e. that the instructions were arbitrary or amounted to a denial of justice or that the judge otherwise violated his obligation of impartiality, are not applicable in this case.

5. In his submission of 12 December 1997, counsel notes that nowhere in the State party's response are the merits dealt with in any detail. Counsel reiterates that the trial judge failed properly to deal with the crucial issue of identification, that the instructions therefore were in breach of established law, and, consequently, amounted to a denial of justice and a violation of article 14 of the Covenant. With respect to the claim of a violation of articles 7 and 10, paragraph 1, of the Covenant, counsel states that the fact that the author's sentence was commuted to life imprisonment after 8 years on death row, is evidence that to keep someone on death row for such a period is cruel and inhuman treatment or punishment in breach of the Covenant.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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[3] Earl Pratt and Ivan Morgan v. Attorney General of Jamaica, judgement of 2 November 1993, All E.R. 1993.

6.2 With regard to the author's allegation of a violation of article 14 on the ground of improper instructions from the trial judge to the jury on the issues of identification and reasonable doubt, the Committee reiterates that while article 14 guarantees the right to a fair trial, it is generally for the domestic courts to review the facts and evidence in a particular case. Similarly, it is for the appellate courts of States parties to review whether the judge's instructions to the jury and the conduct of the trial were in compliance with domestic law, as it in this case was done by the Judicial Committee of the Privy Council. The Committee can, when considering alleged breaches of article 14 in this regard, solely examine whether the judge's instructions to the jury were arbitrary or amounted to a denial of justice, or if the judge manifestly violated his obligation of impartiality. The material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

6.3 Concerning the author's claim that his detention on death row amounts to a violation of articles 7 and 10, paragraph 1, of the Covenant, the Committee refers to its prior jurisprudence[4] where it has held that detention on death row for any specific period of time does not per se constitute cruel, inhuman or degrading treatment in violation of the Covenant, in the absence of further compelling circumstances. Since neither the author nor his counsel has adduced any such "further compelling circumstance", this part of the communication is inadmissible under article 2 of the Optional Protocol for lack of substantiation.

6.4 With regard to the author's claim to be a victim of articles 7 and 10, paragraph 1, of the Covenant because of the conditions of the prison regime at St. Catherine's District Prison, the Committee notes that counsel merely makes reference to reports by Americas Watch and Amnesty International, and does not adduce any particular sufferings by the author. Therefore, also this part of the communication is inadmissible under article 2 of the Optional Protocol for lack of substantiation.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[4] See, inter alia, the Committee's Views on communication No. 588/1994, (Errol Johnson v. Jamaica), adopted on 22 March 1996.

B. Communication No. 646/1995, Lindon v. Australia (Decision adopted on 20 October 1998, sixty-fourth session)*

Submitted by: Leonard John Lindon

Victim: The author

State party: Australia

Date of communication: 11 February 1995 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 October 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication is Leonard John Lindon, a citizen of both Australia and the United States of America, currently residing in Australia. He claims to be a victim of violations by Australia of articles 6 and 14, paragraphs 1 and 7, of the International Covenant on Civil and Political Rights. The author also claims to represent others who have attended mass protests at the Joint Defence Space Research Facility at Pine Gap in the Northern territory, Australia, over the last 15 years. The author claims that these are victims of violations of article 6 of the Covenant. The Covenant and the Optional Protocol entered into force for Australia on 13 August 1980 and on 25 December 1991, respectively.

The facts as submitted by the author

2.1 The author states that on 19 October 1987, he took part in a demonstration on the premises of the Joint Defence Space Research Facility, an establishment known as "Pine Gap", near Alice Springs in the Northern Territory of Australia. On the same day, he was charged with trespassing. On 14 April 1988, he was convicted for that offence by the Court of Summary Jurisdiction (Magistrates' Court) sitting at Alice Springs, and fined $150. He appealed that conviction to the Supreme Court, which allowed the appeal in March 1989, on the ground that the author had not received a fair hearing, and remitted the matter to the former court for rehearing. The rehearing was set down for 2-4 August 1989.

2.2 In preparation for the rehearing, the author, who was then known as "Citizen Limbo", sought to raise several matters on interlocutory applications to each of the Magistrates' Courts and the Supreme Court of the Northern Territory. The numerous applications related to, amongst other things, his attempts to secure the attendance of witnesses, the conduct of the hearing of the various applications and the conduct of the proposed rehearing of the charge of trespassing. Each of the interlocutory applications was unsuccessful and the author sought to have those decisions reviewed either by way of appeal (in some cases, of administrative decisions), or by way of reference for the consideration of the Full Bench of the Supreme Court of the Northern Territory and the Court of Appeal (Full Court) constituted identically. The hearing commenced on 4 September 1989 and proceeded for five days before Justices Kearney, Rice and Martin. The author failed on each of these appeals and references before the Full Court and, on the Court's delivery of its judgement on 27 November 1989 concerning the interlocutory applications, the State applied for and was granted an order for its costs. Meanwhile, the author's application to defer (date unspecified) the rehearing of the trespassing case, had been successful.

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* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the communication.

2.3 After the judgment of the Supreme Court (Full Court) on the interlocutory matters, the author unsuccessfully sought in the High Court of Australia special leave to appeal from the orders of the Full Court.

2.4 On 21 October 1989, the author again trespassed at "Pine Gap". After several adjournments, both counts of trespass were heard on 15 April 1991 by the Court of Summary Jurisdiction, Alice Springs. The author was convicted in his absence and fined a total of $450, which has been paid. He was also ordered to pay costs of $3,856.44 for the rehearing.

2.5 On 15 June 1993, the author received notice from the Attorney-General's office of the intention to commence bankruptcy proceedings against him unless he remitted the litigation costs totalling $33,424.78 within 10 days. This amount represented the costs for the interlocutory motions and for the rehearing of the trespassing case. The author made requests to the Minister of Justice and to the Attorney-General, on 27 July 1993, to intervene to prevent the Australian Government from recovery. On 18 April 1994 the requests were rejected. On 19 July 1994 the Government Solicitor affirmed that bankruptcy proceedings would commence upon failure to remit the stated amount. The author then made an application for an injunction to restrain the Government. On 7 February 1995, the application was dismissed, with costs. The author indicates in his communication that he will file an appeal against this decision.

The complaint

3.1 It is the author's submission that the threat of bankruptcy constitutes a violation of article 14, paragraph 1, since it issues from proceedings which he claims breached his right to a fair hearing, inasmuch as the author's "rights and duties under international law" were not respected by the domestic courts. These rights and duties, the author submits, are such as to require the State to facilitate the author's attempts to prevent the crime of genocide. The author, citing literature on the Nuremberg trials, states that any person who, "'with actual knowledge that a crime against humanity (or war crime or crime against peace) is being committed, and having such knowledge, was "in a position to shape or influence the policy that brings about initiation or 'continuation' of the crime" to the extent of his ability ... will be responsible if he could have influenced such policy and failed to do so'".[5] From this "Nuremberg Defence", the author claims that international law places a personal responsibility upon him as an individual, to do everything possible to prevent such crime not only if he knows that such a crime is being committed or planned, but also if he suspects that such circumstances exist. The author argues that a fortiori, such personal responsibility entails either an obligation to trespass upon prohibited land, or alternatively an exemption from prosecution for doing so. In this regard, the author notes that Australia is a party to both the International Covenant on Civil and Political Rights, the Genocide Convention 1949, and other instruments which condemn and/or prohibit the use of nuclear weapons.

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[5] Martin J., Limbo v. Little 65 NTR 19 at 45, quoting from Frank Lawrence, "The Nuremberg Defence", 40 Hastings L. J. (1989), no page cited.

3.2 The author submits that since the domestic courts refused to recognise the rights and duties under international law in the sense of making them directly enforceable in Australian courts, his right to a fair hearing has been violated. Despite the fact that the alleged violation occurred before the entry into force of the Optional Protocol for Australia, the author claims that the Human Rights Committee can consider it as the bankruptcy proceedings allegedly constitute continuing effects of the original violation. Reference is made to the Committee's jurisprudence.

3.3 The author also alleges a violation of his right to a fair trial as provided for in article 14, on the grounds that the State party's claim for costs in the domestic proceedings and the decisions by the courts to affirm these claims constitute an unreasonable burden on the author as a private individual involved in human rights litigation. Reference is made to the principle in article 14, paragraph 3(d), which contains the right for anyone facing a criminal charge to have assigned legal assistance without payment if he does not have sufficient means.

3.4 The author claims to be a victim of a violation of article 14, paragraph 3(d), as he was denied a legal aid lawyer of his own choosing in respect of the proceedings before the Full Court in September 1989.

3.5 The author further claims to be a victim of a violation of article 14, paragraph 1, as the Full Court which handled the proceedings in September 1989 was not an "independent and impartial tribunal" within the meaning of the Covenant. It is submitted on a general basis that an "unrepresentative minority group of white affluent elderly hetero males dominates the judiciary, the courts, the legal system and the executive and legislature." More specifically, the author claims that Justice Martin disclosed in court on transcript that as a solicitor in Alice Springs he had been a public supporter of Pine Gap being established, that he had acted for Pine Gap companies and that his old law firm still so acted. The author argued in court that this should have disqualified Judge Martin, but despite this he still sat on the case. Though it is not clear from the author's submission, the file shows that this alleged bias later was made the ground for a Leave for Appeal to the High Court.

3.6 The author alleges a breach of article 14, paragraph 7, on the grounds that the threat of bankruptcy is a breach of the right not to be "punished again for an offence for which he has already been finally convicted."

3.7 Finally, the author alleges a violation of the right to life, as protected by article 6 of the Covenant. The author argues that by deploying nuclear weapons Australia imperils its own citizens, and is thereby a "complicity in a conspiracy" with the United States and the former Soviet Union to commit "imminent" genocide on the citizens of Australia, either because the weapons may be used, or because there may be accidents. The author maintains that both the prosecution for trespass and the recovery of costs reveal the aforementioned "conspiracy" on the part of Australia.

State party's observations and author's comments thereon

4.1 In its submission of February 1996, the State party argues that all claims put forward by the author should be declared inadmissible.

4.2 As to the alleged violation of article 14, paragraph 1, the State party claims that the proceedings were conducted before the entry into force of the Optional Protocol for Australia. The State party submits that it has not been substantiated that the proposal to commence bankruptcy proceedings is by act or clear implication a continuation of the alleged previous violation. Nor has it been substantiated that the intention to commence bankruptcy proceedings in itself is a violation of the Covenant. Thus, the State party submits that this claim should be declared inadmissible ratione temporis.

4.3 As to the alleged violation of article 14, paragraph 7, the State party submits that the author has failed to raise an issue set forth in the Covenant, and that this claim should be held inadmissible ratione materiae under article 1 of the Optional Protocol. The State party argues that the prohibition against double jeopardy applies exclusively in the context of criminal proceedings and has no application to bankruptcy proceedings.

4.4 As to the alleged violation of article 6, the State party submits that the author, for the purpose of admissibility, has failed to demonstrate how his right to life has been adversely affected or how an adverse effect is imminent. Thus, the State party claims that the author has failed to substantiate a position as a victim within the meaning of the Optional Protocol, and that this claim should be held inadmissible ratione personae under article 1 of the Optional Protocol.

4.5 With regard to all claims alleged by the author, the State party submits that the author has failed to provide sufficient evidence to substantiate the claims, and that the communication therefore should be declared inadmissible ratione materiae under article 1 of the Covenant.

5. In a submission of 24 November 1997, the author gives his comments on the State party's observations. The author reiterates that Australia's domestic law on the threat or use of nuclear weapons is not in accordance with international law, and that the violation of article 6 therefore is continuing. The author makes reference to several international instruments, and in particular to the advisory opinion given on 8 July 1995 by the International Court of Justice on the legality or use of nuclear weapons.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author claims to represent other alleged victims of article 6 who have participated in mass protests at the Pine Gap Facility over the last 15 years. However, no authorization of the representation has been placed before the Committee, and therefore, this part of the communication is inadmissible under article 1 of the Optional Protocol.

6.3 The Committee notes that the author claims to have suffered an unfair trial, because Australia's policy on the threat and use of nuclear weapons is not in compliance with international law, and that he therefore, according to international law, should not have been convicted for two counts of trespassing.

The Committee reiterates that it cannot reverse decisions made by domestic courts under domestic law. The Committee's competence in this case is solely to consider whether the domestic procedures were in compliance with the Covenant. The Committee considers that the author, for purposes of admissibility, has failed to substantiate that his trial was unfair due to the reason referred to above. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol. Consequently, the author's claim that the proposal to commence bankruptcy proceedings against him is in violation of article 14, paragraph 1, because it is the result of an alleged unfair trial, is likewise inadmissible under article 2 of the Optional Protocol.

6.4 As to the author's claim of a violation of article 14, paragraph 1, because the State party claimed costs and the courts affirmed these claims, the Committee notes that if administrative, prosecutoral or judicial authorities of a State party laid such a cost burden on an individual that his access to court de facto would be prevented, then this might give rise to issues under article 14, paragraph 1. However, the Committee is of the opinion that in the present case the author, for purposes of admissibility, has failed to substantiate such a claim. The costs imposed on him originate mainly from legal proceedings initiated by the author himself, with no direct relationship to the author's defence against the trespassing charge. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee has considered the author's claim that he is a victim of a violation of article 14, paragraph 3(d), as he at the proceedings before the Full Court in September 1989 was denied a legal aid lawyer of his own choosing. The Committee notes that the proceedings concerned the author's interlocutory applications regarding his defence against a trespassing charge where the penalty was a fine, and in the circumstances, the Committee finds that the author, for purposes of admissibility, has failed to substantiate his claim that the interests of justice required the assignment of legal aid. Therefore, this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.6 As to the author's claim that article 14 has been violated because the Full Court which heard his interlocutory applications in September 1989 was not an "independent and impartial tribunal", the Committee notes that both the original hearing and the appeal were concluded before the entry into force of the Optional Protocol for Australia. In order for the Committee to consider the allegations, continuing effects of the violation which in themselves constitute a violation of the Covenant must therefore exist. The Committee takes note of the fact that the author was able to raise, in the hearing before the High Court that took place on 6 November 1997, the issue of a possible bias by certain judges that had dealt with his case. As the High Court heard the author's arguments and responded to them, the Committee finds that the author has failed to substantiate that any continuing effects of alleged lack of independence or impartiality by lower courts exist. Therefore, the communication is inadmissible ratione temporis under article 1 of the Optional Protocol.

6.7 The Committee has considered the author's claims that the opening of bankruptcy proceedings would be in violation of article 14, paragraph 7, as the grounds for bankruptcy proceedings are the costs imposed on him in court proceedings relating to the criminal charges against him. The Committee notes that it appears from the file that bankruptcy proceedings were never actually initiated, and therefore the author cannot be considered to be a victim within the meaning of article 1 of the Optional Protocol. With regard to this claim, the Committee also notes that the author has failed to exhaust domestic remedies. Therefore, this part of the communication is inadmissible both under article 1 and article 5, paragraph 2(b) of the Optional Protocol.

6.8 As to the author's claim that his right to life under article 6 has been violated, the Committee has considered whether the author, for purposes of admissibility, has substantiated a claim as a victim of a violation, within the meaning of article 1 of the Optional Protocol. For a person to be considered to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such a right, or that such an effect is imminent, for example on the basis of existing law and/or judicial or administrative decision.[6] The issue in this case is whether Australia's defence policy in general, and the facilities at "Pine Gap" in particular, constitute an imminent, adverse effect to the author's right to life. The Committee notes that the only way in which the author claims to be personally a victim of a violation of his rights under article 6 of the Covenant is his allegation that the bankruptcy proceedings brought against him would be a part of conspiracy to commit genocide. The author has failed, for purposes of admissibility, to demonstrate his position as the possible victim of such a violation. Therefore this part of the communication is inadmissible under article 1 to the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[6] See the Committee's decision in case No. 429/1990 (E. Wobbes et al. v. the Netherlands), declared inadmissible on 8 April 1993.

C. Communication No. 669/1995, Malik v. Czech Republic (Decision adopted on 21 October 1998, sixty-fourth session)*

Submitted by: Gerhard Malik (represented by Leewog and Grones, a law firm in Mayen, Germany)

Victim: The author

State party: Czech Republic

Date of communication: 6 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication is Gerhard Malik, a German citizen residing in Dossenheim, Germany. Mr. Malik claims to be a victim of violations of articles 12, 14, 26 and 27 of the International Covenant on Civil and Political Rights by the Czech Republic. He is represented by Leewog and Grones, a law firm in Mayen, Germany. The Covenant entered into force for Czechoslovakia on 23 March 1976, the Optional Protocol on 12 June 1991.[7]

The facts as presented by the author

2.1 Mr. Malik was born a citizen of Czechoslovakia on 3 July 1932 in Schoenbrunn/Oder, in what was then known as Eastern Sudetenland. This territory had been part of the Austrian Empire until November 1918, when it became part of the new State of Czechoslovakia. In October 1938, the territory became part of Germany by virtue of the Munich Agreement, and at the end of the Second World War in May 1945 it was restored to Czechoslovakia. Since 1 January 1993 it forms part of the Czech Republic.

2.2 The author states that in 1945 he himself, his parents and grandparents were deprived of Czechoslovak citizenship by virtue of the Benes Decree No. 33 of 2 August 1945 on the Determination of Czechoslovak citizenship of persons belonging to the German and Hungarian Ethnic Groups.

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* The following members of the Committee participated in the examination of the communication: Mr. Prafullachandra N. Bhagwati, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of an individual opinion by Committee members E. Klein and C. Medina Quiroga is appended to the present document.

[7] The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

2.3 Mr. Malik and his family were subjected to collective exile, together with other members of the German ethnic group of Schoenbrunn, who were expelled to the United States occupation zone of Germany on 21 July 1946. According to the author, he and his family did not have any real or legal opportunity to oppose this measure. Their property was confiscated by virtue of Benes Decree No. 108/1945 of 25 October 1945. The author submits the text of the decree and a copy of the relevant page from the registry book in Novy Jicin (Schoenbrunn), which shows that his family's property was confiscated pursuant to Decree No. 108/1945.

The complaint

3.1 The author complains of a continued violation of his rights to enter his own country, to equality before the courts, to non-discrimination and to the enjoyment of minority rights. The continuing violation has been allegedly renewed by the judgement of 8 March 1995 of the Constitutional Court of the Czech Republic (text enclosed), which reaffirms the continued validity of the Benes Decrees. The validity of the Benes Decrees has been repeatedly confirmed by Czech authorities, including the Czech Prime Minister, Vaclav Klaus, on 23 August 1995.

3.2 Mr. Malik claims that over the past decades he has been deprived of the right enunciated in article 12, paragraph 4, of the Covenant, that is to return to his homeland, where his parents and grandparents were born and where his ancestors are buried. Moreover, he has been deprived of the right to exercise his cultural rights, in community with other members of the German ethnic group, to worship in the churches of his ancestors and to live in the land where he was born and where he grew up.

3.3 Mr. Malik specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi confiscations, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.4 Mr. Malik notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Malik and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

3.5 With regard to the application of the Covenant to the facts of his case, Mr. Malik points out that although the Benes Decrees date back to 1945 and 1946, they have continuing effects which themselves constitute violations of the Covenant. Moreover, the Decrees were reaffirmed in the Judgment of the Czech

Constitutional Court of 8 March 1995. The discriminatory law on restitution of 1991 also falls within the period of application of the Covenant and the Optional Protocol to the Czech Republic.

3.6 As to the requirement of exhaustion of domestic remedies, the author states that not only does Czech legislation not establish a recourse for persons in his situation, but, moreover, as long as the discriminatory Benes Decrees are held to be valid and constitutional, any appeal against them is futile. In this context the author refers to a recent challenge of the Benes Decrees, which an ethnic German resident in the Czech Republic, brought before the Supreme Constitutional Court of the Czech Republic. On 8 March 1995 the Court held that the Benes Decrees were valid and constitutional. Therefore, no available and effective remedies exist in the Czech Republic.

State party's observations on admissibility

4.1 By submission of 15 February 1996, the State party notes that the author is a German citizen residing in Germany. At the time of submission of the communication, he was not a citizen nor a resident of the Czech Republic and thus did not hold any legally relevant status in the territory of the Czech Republic.

4.2 The State party recalls that Decree No. 33 of 2 August 1945, through which the author was deprived of his Czechoslovak citizenship, contained provisions enabling restoration of Czechoslovak citizenship. Applications for restoration of citizenship were to be lodged with the appropriate authority within six months of the decree being issued. Since the author and his family did not avail themselves of this opportunity to have their citizenship restored to them, the State party submits that domestic remedies have not been exhausted.

4.3 The State party challenges the author's argument that he and his family did not have any real opportunity to oppose their removal from Czechoslovakia. The State party argues that they were removed because they failed to exhaust domestic remedies against the deprivation of their citizenship. With reference to the principle *ignoratia legis neminem excusat*, the State party maintains that the legal status of the author and his family changed due to omission on their part and that the possible objection that they were not informed about the appropriate legislation is irrelevant.

4.4 With regard to the expropriation of his family's property, and the ensuing alleged violation of his Covenant rights, the State party points out that it has only been bound by the Covenant since its entry into force in 1976, and argues that the Covenant can thus not be applied to events that occurred in 1945-1946. With regard to the author's argument that the Constitutional Court's judgement of 8 March 1995 reaffirms the violations of the past, and makes any appeal to the Courts futile, the State party points out that following the said judgement decree No. 108/1945 no longer operates as a constitutional regulation and that the compatibility of the decree with higher laws (such as the Constitution and the Covenant) can thus be challenged before the courts. In this context, the State party points out that Constitutional Law No.2/1993 (Charter of Fundamental Rights and Freedoms) contains a prohibition of any form of discrimination. The State party therefore challenges the author's statement that exhaustion of domestic remedies would be futile. According to the State party, the author's statement demonstrates ignorance of Czech law and is incorrect.

4.5 The State party submits that international treaties on human rights and fundamental freedoms binding on the Czech Republic are immediately applicable and superior to law. The State party explains that its Constitutional Court has the power to nullify laws or regulations if it determines that they are unconstitutional. Anyone who claims that his or her rights have been violated by a decision of a public authority may submit a motion for review of the legality of such decision.

4.6 With regard to the author's argument that the violation of his rights continues under the existing Czech legislation, the State party claims that the author could have, on the basis of the direct applicability of the Covenant in Czech legislation, brought action before the Czech courts. Moreover, the State party denies that the author's rights were ever violated and consequently the alleged violations cannot continue at present either.

4.7 In conclusion, the State party requests the Committee to declare the communication inadmissible on the grounds that the author has failed to exhaust domestic remedies, and on the ground that the alleged violations occurred before the entry into force of the Covenant and the Optional Protocol thereto.

Author's comments

5.1 In his comments on the State party's submission, counsel recalls that it is not the author's fault that he is no longer a Czech citizen nor has residence in the Czech Republic because he was stripped of his citizenship and he was expelled by the State party.

5.2 Counsel argues that the State party is likewise estopped from claiming that the author or his family could have regained his citizenship pursuant to an application. Counsel recalls that at the time the author and his family were threatened with immediate expulsion by the State party which had also confiscated all of their property, as a result of which they were totally destitute. As a consequence, the remedies existing in 1945 were in practice not available to the author and his family, nor to most Germans. Counsel submits that if the State party contends that persons in the situation of the author could have availed themselves of effective domestic remedies, it should provide examples of those who did so successfully.

5.3 The author points out that at the time of the expulsion of his family, they were treated as total outlaws. Thousands of Germans were detained in camps. According to the author, not only was a complaint to the Czech authorities futile, but in many cases when people did complain, they were subjected to physical abuse.

5.4 The author acknowledges that the Covenant entered into force for Czechoslovakia only in 1976. However, he contends that the restitution legislation of 1991 is discriminatory, because it excludes restitution for the German minority. Furthermore, he argues that the Constitutional Court's decision of 8 March 1995, which confirmed the continuing validity of the Benes Decrees, is a confirmation of a past violation and thus brings the communication within the applicability of the Covenant and the Optional Protocol. Counsel refers to the Committee's Views in case No. 516/1992 (Simunek v. Czech Republic), where the Committee held that confiscations that occurred in the period prior to the entry into force of the Covenant and Optional Protocol may nevertheless be the subject of a communication before the Committee if the effects of the confiscations have continued or if the legislation intended to remedy the confiscations is discriminatory.

5.5 With regard to the Constitutional Court's statement that decree No. 108/1945 no longer had a constitutive character, the author submits that this is a statement of fact, since the confiscations had been completed and the Germans had no possibility to contest them. With regard to the State party's statement that the

Constitutional Court has the power to repeal laws or their provisions if they are inconsistent with the Constitution or with an international human rights treaty, counsel submits that the Constitutional Court was requested to repeal the Benes decrees as being discriminatory but instead confirmed their constitutionality in its judgement of 8 March 1995. Following this judgement, no effective remedy is available to the author, as it would be futile to challenge the legality of the decrees again.

5.6 With regard to the State party's claim that domestic remedies are available to the author at present, counsel requests the State party to indicate precisely, in the circumstances of the author's case, what procedure would be available to him and to give examples of successful use of this procedure by others. In this connection, counsel refers to the Committee's jurisprudence that it is not sufficient for a State party to list the legislation in question, but that a State party should explain how an author can avail himself of the legislation in his concrete situation.

5.7 Finally, counsel argues that if indeed the Covenant is superior to Czech law, then the State party is under an obligation to correct the discrimination to which the author and his family were subjected in 1945 and all the consequences emanating therefrom. According to counsel, there is no indication that the State party is prepared to do so. On the contrary, counsel claims that recent statements by high officials in the State party's Government, announcing the privatization of formerly confiscated German property, show that there is no willingness on the part of the State party to give any relief to the author or anyone in a similar situation.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim under article 12, paragraph 4, of the Covenant, the Committee notes that the deprivation of his citizenship and his expulsion in 1946 were based on Benes' decree No. 33. Although the Constitutional Court in the Czech Republic declared Benes' decree No. 108, authorizing the confiscation of properties belonging to ethnic Germans, constitutional, the Court was never called upon to decide the constitutionally of decree No. 33. The Committee also notes that, following the Court's judgment of 8 March 1995, the Benes' decrees have lost their constitutional status. The compatibility of decree No. 33 with higher laws, including the Covenant which has been incorporated in Czech national law, can thus be challenged before the courts in the Czech Republic. The Committee considers that under article 5, paragraph 2 (b), of the Optional Protocol, the author should bring his claim first before the domestic courts before the Committee is in a position to examine his communication. This claim is thus inadmissible for non-exhaustion of domestic remedies.

6.3 The Committee likewise considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 27 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.4 The author has further claimed violations of articles 14 and 26, because, whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been enacted for ethnic Germans for properties confiscated in 1945 and 1946 following the Benes decrees.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime.[8] The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[8] See the Committee's decision declaring inadmissible communication No. 643/1995 (Drobek v. Slovakia), adopted on 14 July 1997.

APPENDIX

Individual opinion by Cecilia Medina Quiroga and Eckart Klein

(partly dissenting)

To our regret we cannot follow the Committee's decision that the communication is also inadmissible as far as the author claims that he is a victim of a violation of article 26 of the Covenant, because the Law No. 87/1991 would deliberately discriminate against him for ethnical reasons (See para. 3.4). For the reasons given in our Individual Opinion in Communication No. 643/1995 (Drobek v. Slovakia), we think that the Committee should have declared the communication admissible in this regard.

(Signed) Cecilia Medina Quiroga

(Signed) Eckart Klein

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 670/1995, Schlosser v. Czech Republic (Decision adopted on 21 October 1998, sixty-fourth session)*

Submitted by:	Ruediger Schlosser (represented by Leewog and Grones, a law firm in Mayen, Germany)
Victim:	The author
State party:	Czech Republic
Date of communication:	5 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication is Ruediger Schlosser, a German citizen residing in Tretow, Germany (Province of Brandenburg, former German Democratic Republic). Mr. Schlosser claims to be a victim of violations of articles 12, 14, 26 and 27 of the International Covenant on Civil and Political Rights by the Czech Republic. He is represented by Leewog and Grones, a law firm in Mayen, Germany. The Covenant entered into force for Czechoslovakia on 23 March 1976, the Optional Protocol on 12 June 1991.[9]

The facts as submitted by the author

2.1 Mr. Schlosser was born a citizen of Czechoslovakia on 7 June 1932 in Aussig (today Usti nad Labem), in what was then known as Sudetenland. This territory had been part of the Austrian Empire until November 1918, when it became part of the new State of Czechoslovakia. In October 1938, the territory became part of Germany by virtue of the Munich Agreement, and at the end of the Second World War in May 1945 it was restored to Czechoslovakia. Since 1 January 1993 it forms part of the Czech Republic.

2.2 The author states that in 1945 he as well as his parents were deprived of Czechoslovak citizenship by virtue of the Benes Decree No. 33 of 2 August 1945 on the Determination of Czechoslovak citizenship of persons belonging to the German and Hungarian Ethnic Groups.

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* The following members of the Committee participated in the examination of the communication: Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Mr. Omran El Shafei, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Roman Wieruszewski and Mr. Maxwell Yalden. The text of an individual opinion by Committee members E. Klein and C. Medina Quiroga is appended to the present document.

[9] The Czech and Slovak Federal Republic ceased to exist on 31 December 1992. On 22 February 1993, the Czech Republic notified its succession to the Covenant and the Optional Protocol.

2.3 Mr. Schlosser and his family were subjected to collective exile, together with other members of the German ethnic group of Aussig, who were expelled to Saxonia in the then Soviet occupation zone of Germany on 20 July 1945. He claims that this expulsion was in violation of international law, since it was based on ethnic and linguistic discrimination. Mr. Schlosser's father Franz, who died in 1967, was an antifascist and member of the Social Democratic party. He had been a businessman in the construction industry and owned two houses and several pieces of real estate, which were confiscated by virtue of Benes Decrees No. 12/1945 of 21 June 1945 and No. 108/1945 of 25 October 1945. The author submits the text of the decrees and a copy of the relevant pages from the registry book of Chabarovice, Usti nad Labem, which show that the property was confiscated pursuant to the Benes Decrees.

The complaint

3.1 The author complains of a continued violation of his rights to enter his own country, to equality before the courts, to non-discrimination and to the enjoyment of minority rights. The continuing violation has been renewed by the judgement of 8 March 1995 of the Constitutional Court of the Czech Republic, which reaffirms the continued validity of the Benes Decrees, which were applied to the author and his family. The validity of the Benes Decrees has been repeatedly confirmed by Czech authorities, including the Czech Prime Minister, Vaclav Klaus, on 23 August 1995.

3.2 Mr. Schlosser claims that over the past decades he has been deprived of the right enunciated in article 12, paragraph 4, of the Covenant, that is to return to his homeland and settle there, where his parents and grandparents were born and where his ancestors are buried. Moreover, he claims that he has been deprived of the right to exercise his cultural rights, in community with other members of the German ethnic group, to worship in the churches of his ancestors and to live in the land where he was born and where he grew up. In this context he also invokes the right to return enunciated by the United Nations Security Council with regard to expellees and refugees from Bosnia, Croatia and Serbia (Security Council Resolutions Nos. 941/1994, 947/1994, 981/1995 and 1009/1995).

3.3 With regard to the exercise of his minority rights in his homeland, Mr. Schlosser points out that no State is allowed to frustrate the exercise of the rights of its subjects by depriving them of citizenship and expelling them.

3.4 Mr. Schlosser specifically complains of the denial of equality before the courts, in violation of article 14, and of discrimination, in violation of article 26. He points out that the enforced expatriation in 1945, the expropriations and the expulsions were carried out in a collective way, and were not based on conduct but rather on status. All members of the German minority, including Social Democrats and other antifascists were expelled and their property was confiscated, just because they were German; none of them were given the opportunity of having their rights determined by a court of law. In this context he refers to the policy of ethnic cleansing in the former Yugoslavia, which has been recognized to be in violation of international law. He also refers to the Nazi expatriation and expropriation of German Jews, which were arbitrary and discriminatory. He points out that while Nazi laws have been abrogated and restitution or compensation has been effected for Nazi crimes, neither Czechoslovakia nor the Czech Republic has offered restitution or compensation to the expatriated, expropriated and expelled German minority.

3.5 Mr. Schlosser notes that by virtue of Law No. 87/1991 Czech citizens with Czech residence may obtain restitution or compensation for properties that were confiscated by the Government of Czechoslovakia in the period from 1948 to 1989. Mr. Schlosser and his family do not qualify for compensation under this law, because their properties were confiscated in 1945, and because they lost their Czech citizenship as a result of Benes Decree No. 33 and their residence because of their expulsion. Moreover, he points out that whereas there is a restitution and compensation law for Czechs, none has been enacted to allow any form of restitution or compensation for the German minority. This is said to constitute a violation of article 26 of the Covenant.

3.6 With regard to the application of the Covenant to the facts of his case, Mr. Schlosser points out that although the Benes Decrees date back to 1945 and 1946, they have continuing effects which in themselves constitute violations of the Covenant. In particular, the deprivation of Czech citizenship has continuing effects and prevents him and members of his family from returning to the Czech Republic except as tourists. Current Czech law does not provide a right for former Czech citizens of German ethnic origin to return and settle there. Moreover, the Benes Decrees were reaffirmed in the judgment of the Czech Constitutional Court of 8 March 1995. The discriminatory law on restitution of 1991 also falls within the period of application of the Covenant and the Optional Protocol to the Czech Republic.

3.7 As to the requirement of exhaustion of domestic remedies, the author states that not only does Czech legislation not establish a recourse for persons in his situation, but, moreover, as long as the discriminatory Benes Decrees are held to be valid and constitutional, any appeal against them is futile. In this context the author refers to a recent challenge of the Benes Decrees, which an ethnic German resident in the Czech Republic brought before the Constitutional Court of the Czech Republic. On 8 March 1995 the Court ruled that the Benes Decrees were valid and constitutional. Therefore, no suitable and effective remedies exist in the Czech Republic.

State party's observations on admissibility

4.1 By submission of 15 February 1996, the State party notes that the author is a German citizen residing in Germany. At the time of submission of the communication, he was not a citizen nor a resident of the Czech Republic and thus did not hold any legally relevant status in the territory of the Czech Republic.

4.2 The State party recalls that Decree No. 33 of 2 August 1945, through which the author was deprived of his Czechoslovak citizenship, contained provisions enabling restoration of Czechoslovak citizenship. Applications for restoration of citizenship were to be lodged with the appropriate authority within six months of the decree being issued. Since the author and his family did not avail themselves of this opportunity to have their citizenship restored to them, the State party submits that domestic remedies have not been exhausted.

4.3 The State party challenges the author's argument that he and his family did not have any real opportunity to oppose their removal from Czechoslovakia. The State party argues that the author and his family left the country not due to coercion but by their own choice. Since they were still Czechslovakian citizens at the time they left the country, they could have made use of the remedies available to all nationals. They also failed to exhaust domestic remedies against the deprivation of their citizenship. With reference to the principle *ignoratia legis neminem excusat*, the State party maintains that the legal status of the author and his family changed due to omission on their part and that the possible objection that they were not informed about the appropriate legislation is irrelevant.

4.4 With regard to the expropriation of his family's property, and the ensuing alleged violation of his Covenant rights, the State party points out that it has only been bound by the Covenant since its entry into force in 1976, and argues that the Covenant can thus not be applied to events that occurred in 1945-1946. With regard to the author's argument that the Constitutional Court's judgement of 8 March 1995 reaffirms the violations of the past, and makes any appeal to the Courts futile, the State party points out that following the said judgement decree No. 108/1945 no longer operates as a constitutional regulation and that the compatibility of the decree with higher laws (such as the Constitution and the Covenant) can thus be challenged before the courts. In this context, the State party points out that Constitutional Law No. 2/1993 (Charter of Fundamental Rights and Freedoms) contains a prohibition of any form of discrimination. The State party therefore challenges the author's statement that exhaustion of domestic remedies would be futile. According to the State party, the author's statement demonstrates ignorance of Czech law and is incorrect.

4.5 The State party submits that international treaties on human rights and fundamental freedoms binding on the Czech Republic are immediately applicable and superior to law. The State party explains that its Constitutional Court has the power to nullify laws or regulations if it determines that they are unconstitutional. Anyone who claims that his or her rights have been violated by a decision of a public authority may submit a motion for review of the legality of such decision.

4.6 With regard to the author's argument that the violation of his rights continues under the existing Czech legislation, the State party claims that the author could have, on the basis of the direct applicability of the Covenant in Czech legislation, brought action before the Czech courts. Moreover, the State party denies that the author's rights were ever violated and consequently the alleged violations cannot continue at present either.

4.7 In conclusion, the State party requests the Committee to declare the communication inadmissible on the grounds that the author has failed to exhaust domestic remedies, and on the ground that the alleged violations occurred before the entry into force of the Covenant and the Optional Protocol thereto.

Author's comments

5.1 In his comments on the State party's submission, counsel recalls that it is not the author's fault that he is no longer a Czech citizen nor has residence in the Czech Republic because he was stripped of his citizenship and was expelled by the State party.

5.2 Counsel argues that the State party is likewise estopped from claiming that the author or his family could have regained his citizenship pursuant to an application. Counsel recalls that at the time the author and his family, despite the fact that they were members of the Social Democratic Party and anti-fascists, were already expelled by the State party (July 1945) which had also confiscated all of their property, as a result of which they were totally destitute. As a consequence, the remedies existing in 1945 were in practice not available to the author and his family, nor to most Germans. Counsel submits that if the State party contends that persons in the situation of the author could have availed themselves of effective domestic remedies, it should provide examples of those who did so successfully.

5.3 The author points out that at the time of the expulsion of his family, they were treated as total outlaws. Thousands of Germans were detained in camps. According to the author, not only was a complaint to the Czech authorities futile, but in many cases when people did complain, they were subjected to physical abuse.

5.4 The author acknowledges that the Covenant entered into force for Czechoslovakia only in 1976. However, he contends that the restitution legislation of 1991 is discriminatory, because it excludes restitution for the German minority. Furthermore, he argues that the Constitutional Court's decision of 8 March 1995, which confirmed the continuing validity of the Benes Decrees, is a confirmation of a past violation and thus brings the communication within the applicability of the Covenant and the Optional Protocol. Counsel refers to the Committee's Views in case No. 516/1992 (Simunek v. Czech Republic), where the Committee held that confiscations that occurred in the period prior to the entry into force of the Covenant and Optional Protocol may nevertheless be the subject of a communication before the Committee if the effects of the confiscations have continued or if the legislation intended to remedy the confiscations is discriminatory.

5.5 With regard to the Constitutional Court's statement that decree No. 108/1945 no longer had a constitutive character, the author submits that this is a statement of fact, since the confiscations had been completed and the Germans had no possibility to contest them. With regard to the State party's statement that the Constitutional Court has the power to repeal laws or their provisions if they are inconsistent with the Constitution or with an international human rights treaty, counsel submits that the Constitutional Court was requested to repeal the Benes decrees as being discriminatory but instead confirmed their constitutionality in its judgement of 8 March 1995. Following this judgement, no effective remedy is available to the author, as it would be futile to challenge the legality of the decrees again.

5.6 With regard to the State party's claim that domestic remedies are available to the author at present, counsel requests the State party to indicate precisely, in the circumstances of the author's case, what procedure would be available to him and to give examples of successful use of this procedure by others. In this connection, counsel refers to the Committee's jurisprudence that it is not sufficient for a State party to list the legislation in question, but that a State party should explain how an author can avail himself of the legislation in his concrete situation.

5.7 Finally, counsel argues that if indeed the Covenant is superior to Czech law, then the State party is under an obligation to correct the discrimination to which the author and his family were subjected in 1945 and all the consequences emanating therefrom. According to counsel, there is no indication that the State party is prepared to do so. On the contrary, counsel claims that recent statements by high officials in the State party's Government, announcing the privatization of formerly confiscated German property, show that there is no willingness on the part of the State party to give any relief to the author or anyone in a similar situation.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim under article 12, paragraph 4, of the covenant, the Committee notes that the deprivation of his citizenship was based on Benes' decree No. 33. Although the Constitutional Court in the Czech Republic declared Benes' decree No. 108, authorizing the confiscation of properties belonging to ethnic Germans, constitutional, the Court was never called upon to decide the constitutionally of decree No. 33. The Committee also notes that, following the Court's judgment of 8 March 1995, the Benes' decrees have lost their constitutional status. The compatibility of decree No. 33 with higher laws, including the Covenant which has been incorporated in Czech national law, can thus be challenged before the courts in the Czech Republic. The Committee considers that under article 5, paragraph 2 (b), of the Optional Protocol, the author should bring his claim first before the domestic courts before the Committee is in a position to examine his communication. This claim is thus inadmissible for non-exhaustion of domestic remedies.

6.3 The Committee likewise considers that the author has failed to substantiate, for purposes of admissibility, his claim under article 27 of the Covenant. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6.4 The author has further claimed violations of articles 14 and 26, because, whereas a law has been enacted to provide compensation to Czech citizens for properties confiscated in the period from 1948 to 1989, no compensation law has been enacted for ethnic Germans for properties confiscated in 1945 and 1946 following the Benes decrees.

6.5 The Committee has consistently held that not every distinction or differentiation in treatment amounts to discrimination within the meaning of articles 2 and 26. The Committee considers that in the present case, legislation adopted after the fall of the Communist regime in Czechoslovakia to compensate victims of that regime does not appear to be prima facie discriminatory within the meaning of article 26 merely because, as the author contends, it does not compensate the victims of injustices committed in the period before the communist regime.[10] The Committee considers that the author has failed to substantiate, for purposes of admissibility, his claim that he is a victim of violations of articles 14 and 26 in this regard. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[10] See the Committee's decision declaring inadmissible communication No. 643/1995 (Drobek v. Slovakia), adopted on 14 July 1997.

APPENDIX

Individual Opinion by Cecilia Medina Quiroga and Eckart Klein
(partly dissenting)

To our regret we cannot follow the Committee's decision that the communication is also inadmissible as far as the author claims that he is a victim of a violation of article 26 of the Covenant, because the Law No. 87/1991 would deliberately discriminate against him for ethnical reasons (See para. 3.5). For the reasons given in our Individual Opinion in Communication No. 643/1995, (Drobek v. Slovakia) we think that the Committee should have declared the communication admissible in this regard.

(Signed) Cecilia Medina Quiroga (Signed) Eckart Klein

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 673/1995, Gonzales v. Trinidad and Tobago (Decision adopted on 23 March 1999, sixty-fifth session)*

Submitted by:	Franklyn Gonzales (represented by Barlow Lyde and Gilbert, a law firm in London)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	12 December 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Franklyn Gonzales, a Trinidadian citizen. He claims to be the victim of a violation by Trinidad and Tobago of articles 7 and 14 of the International Covenant on Civil and Political rights. He is represented by Barlow Lyde & Gilbert, a London law firm. The author's death sentence has been commuted.

The facts as presented by the author

2.1 On 17 April 1989, the author was convicted of the murder of one Indra Gajadhar (in May 1985), and sentenced to death by the San Fernando Assizes. The Court of Appeal of Trinidad and Tobago dismissed the author's appeal on 30 March 1994. His application for special leave to appeal to the Privy Council was dismissed on 12 December 1994. With this it is submitted that all available domestic remedies have been exhausted.

2.2 The prosecution's case was based on evidence given by two eyewitness. Cecilia de Leon (the deceased's sister-in-law) and David Ballack (a friend of both the deceased and Ms. de Leon) were sitting some one hundred feet away from the scene of the crime. They testified that they saw Mrs. Gajadhar arrive home, and that Mr. Gonzales appeared from behind her house and attacked her without prior argument or provocation. It appears from the medical evidence that Mrs. Gajadhar suffered several wounds, and that she was decapitated.

2.3 There are a number of inconsistencies between Mr. Ballack's testimony during the trial and his original deposition, in which he had said that he had seen Mr. Gonzales watering peppers in his garden, and that there were some pea trees between where he was sitting and the scene of the crime. During the trial he said that he could not remember having said that the author had been watering peppers in his garden, and that the pea trees were in fact between the houses of the deceased and the author, so his vision of the scene of the crime had not been impaired.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia.

2.4 The case for the defence was one of self-defence and provocation. The author claimed that Ms. Gajadhar subjected his family to verbal obscenities and racial insults, had stoned his house the night before the incident when his wife and new born baby were alone and deliberately cut his water hose.

2.5 The author claims that Ms. Gajadhar arrived home from her job, harvesting cocoa, carrying a "swipper" (harvesting cutlass) together with her handbag and a water bottle. Mr. Gonzales in his unsworn statement from the dock said that, when he confronted her about the stone throwing, Ms. Gajadhar verbally abused him and threatened him with the swipper, cutting him several times on the hand. He entered his house, grabbed his cutlass, returned outside, and fought with her. He admits that he struck her several times, resulting in her death.

2.6 The author turned himself in to the police officer who arrived at the scene of the crime, on 17 May 1985. He was taken into custody, gave a full statement and was duly cautioned.

2.7 There are several inconsistencies between the author's unsworn testimony from the dock and his statement to the police. In his statement he did not mention a confrontation with Ms. Gajadhar, as to why she had been throwing stones at his house; instead he said that she had demanded to know what he was looking at when she arrived at home, at which point he went to get his cutlass and began fighting with her. The author makes no reference to an initial attack by Ms. Gajadhar, whereas he mentions that he subsequently set the deceased's curtains on fire. The author claims that these inconsistencies arose because Corporal Ramdath did not record all the details of his declaration. No Justice of the Peace was present, nor was the author told that he could have counsel present while he was being interrogated.

2.8 A psychiatrist, Dr. Iqbal Ghany, gave evidence for the defence to the effect that the author has a compulsive personality disorder, and that he was suffering from post-traumatic stress syndrome and reactive depression. It is further submitted that the author sustained a head injury during a motor vehicle accident in 1979, which together with a reactive depressive state, could facilitate his loss of self control.

The complaint

3.1 Counsel claims that the author is a victim of a violation of article 14 paragraph 1, because the Court of Appeal failed to remedy the trial judge's misdirections to the jury on several issues:

(a) The trial judge directed the jury that in assessing whether the author had been provoked into losing his self-control they should consider whether the provocation was sufficient to make a reasonable man do as he did, and should take into account everything said or done. However, he failed to direct them that the "reasonable man" with whom the author should be compared was also someone who would have the same personality disorder and racial characteristics of the author.

(b) The trial judge erred when he admitted into evidence part of the author's statement which referred to the author returning to the deceased's house and setting the curtains alight. Counsel states that the prejudicial effect of this outweighed its probative value.

(c) The trial judge erred in his comments regarding counsel's suggestion that corporal Ramdath had omitted part of the author's statement under caution. The judge told the jury that the author had chosen to give un unsworn statement from the dock rather than a sworn statement and be cross-examined. The trial judge made reference to the possible sanctions which would befall Corporal Ramdath if the author's allegations were true. This is said to have unfairly influenced the jury into believing Corporal Ramdath in detriment of the author.

3.2 Counsel points out that the author has been held on death row since his conviction, for over six years. Reference is made to the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan.[11] Counsel submits that the author's prolonged stay on death row amounts to a violation of article 7, and also that his execution after such a prolonged period would amount to a violation of article 7.

Facts and proceedings before the Committee

4.1 The communication was transmitted to the State party on 12 January 1996, and the State party was requested to make any submission relevant to the admissibility of the communication, not later than 12 March 1996. On 4 October 1996, the State party informed the Committee that the author's death sentence had been commuted to a term of imprisonment with hard labour for a period of seventy-five years. No observations concerning the admissibility of the communication were received, despite a reminder sent to the State party on 20 November 1997.

4.2 The Committee recalls that is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal and regrets the lack of cooperation of the State party.

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the author's claim that the judge's instructions to the jury were inadequate, the Committee refers to its prior jurisprudence and reiterates that it is generally not for the Committee, but for the appellate courts of States parties, to review specific instructions to the jury by the trial judge, unless it can be ascertained that the instructions to the jury were manifestly arbitrary or amounted to a denial of justice. The material before the Committee and the author's allegations do not show that the trial judge's instructions or the conduct of the trial suffered from such defects. Accordingly, this part of the communication is inadmissible as the author has failed to forward a claim within the meaning of article 2 of the Optional Protocol.

5.3 With respect to the author's claim that the period of seven years which he spent on death row constitutes a violation of article 7 of the Covenant, the

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[11] Earl Pratt and Ivan Morgan v. Attorney-General of Jamaica; PC Appeal No. 10 of 1993, judgement delivered on 2 November 1993.

Committee refers to its jurisprudence[12] that detention on death row for a specific period of time per se does not violate the Covenant, in the absence of further compelling circumstances. In the instant case, the author has not invoked any ground other than the period of time in substantiation of his claim. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[12] See communication No. 558/1994 (Erroll Johnson v. Jamaica), Views adopted on 22 March 1996.

F. Communication No. 714/1996, Gerritsen v. the Netherlands (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by:	A. Gerritsen (represented by Dr. M. W. C. Feteris)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	20 December 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. A. Gerritsen, a Dutch citizen, born on 23 October 1921. He claims to be a victim of a violation by the Netherlands of article 14, paragraphs 1 and 5, of the Covenant on Civil and Political Rights. He is represented by Dr. M. W. C. Feteris of Coopers and Lybrand, a tax law firm in Amsterdam.

Facts as submitted by the author

2.1 As a resident of the Netherlands, the author is subject to Dutch income tax. In April 1990, the tax inspector initially imposed tax assessments over the years 1987 and 1988, in conformity with the author's returns for these years. In the autumn of 1990, however, the inspector started an investigation to check whether the author's tax returns over the years 1987 and 1988 had been correct and complete.

2.2 The author states that during this investigation the tax inspector concluded that the increase of the author's net wealth in these years, taking account of his recorded private expenses, could not be explained by the taxable income as declared in tax returns. The author explained that he had won substantial amounts by placing money on horses and by selling coins and jewels, which would have been exempt from taxation. The inspector did not believe this and took the point of view that the increase in net wealth of the author had been caused by taxable income that had not been mentioned in the tax declarations. The tax inspector then imposed penalties amounting to approximately DFL 480,000 because of tax fraud.

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* The following members of the Committee participated in the examination of the communication: Mr. Afbdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.3 The author states that he appealed against the penalties to the Tax Chamber of the High Court (Belastingkamer van het Gerechtshof) in Amsterdam. The Tax Chamber, in two similar decisions made in June 1995, materially upheld the decision of the tax inspector, but decided that because of special circumstances, such as the time that had elapsed since the charges were made, the penalties should be reduced to an amount of DFL 200,000 instead of DFL 480,000. The author emphasizes that this was a decision of the court in first instance.

2.4 The author states that he appealed against these decisions to the Supreme Court (Hoge Raad) on 20 November 1995. However, this appeal has the character of cassation proceedings and the assessment of the facts and the amount of the penalties are said to be outside the competence of the Supreme Court.

2.5 The author explains that because tax fraud occurs so often, the State decided to authorize tax inspectors to impose penalties without intervention of a court. When deciding about an assessment, the tax inspector has already been informed about many relevant facts concerning the case. A taxpayer failing to cooperate or intentionally giving false information, can be subjected to severe penalties. When a taxpayer disputes the assessment made by the tax inspector, the burden of proof is on him.

2.6 The author submits that he fulfils the admissibility criteria set out in article 5, paragraph 2 (b), of the Optional Protocol to the Covenant. He argues that no further domestic remedies are available, given prior decisions of the Supreme Court dated 3 May 1989[13] and 11 October 1989.

The complaint

3.1 The author argues that, since the original penalties were imposed upon him by a tax inspector, who cannot be regarded as an independent judicial authority, and since the penalties had the character of criminal sanctions, his rights under article 14, paragraph 1, have been violated. The author claims that although the fiscal administrative penalties inflicted on him do not belong to the field of criminal law under the Dutch national legal system, this is not decisive when interpreting article 14 of the Covenant.[14] The author contends that these penalties are not imposed under the Dutch system of criminal law out of considerations of expediency.

3.2 The author claims that severe penalties imposed by a State organ other than a judicial authority as a consequence of the commission of a criminal offence are unacceptable. In his view, penalties that are criminal and therefore fall within the scope of article 14 of the Covenant, should be imposed by a judicial authority and should be susceptible of review by a higher tribunal; especially when the penalty is severe.

3.3 The author states that if administrative penalties were accepted, especially for serious offences, it would give States parties the freedom to abolish the traditional criminal procedure, except for the sentence of imprisonment, which must, according to article 9 of the Covenant, in all cases be imposed by a tribunal. This would create, according to the author, an undesirable situation.

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[13] The Supreme Court decided (1) that the Dutch legal system, according to which the tax inspector can impose penalties, is not incompatible with article 6 of the European Convention on Human Rights and (2) that it is beyond the competence of the judiciary to create a solution for a possible violation of article 14, paragraph 5, of the International Covenant on Civil and Political Rights.

[14] Committee's Views on communication No. 50/1979 (Van Duzen v. Canada), adopted on 7 April 1982.

3.4 The author states that a disadvantage of judicial intervention only after the penalty has been imposed, is that the penalty must in principle be paid, even if the case is brought before the court. Although an extension of payment can be granted, the taxpayer must pay interest over the penalty, also over the period before the court has decided on his appeal.

3.5 Furthermore, the author states that because there are many inspectors who may impose these penalties and because inspectors only deal with a specific area, there is a great risk that the amount of penalty may vary from inspector to inspector and objectively result in inequality of treatment. The author further complains that the legal safeguards during an administrative procedure are not comparable to those during a criminal procedure.

3.6 With regard to the right of appeal the author argues that the judgement of the High Court reflects materially a conviction and sentence for a crime and that since this conviction and sentence cannot be fully reviewed by a higher tribunal, article 14, paragraph 5, of the Covenant has been violated. In this connection, the author states that 'crime' in article 14, paragraph 5 must be interpreted in the same way as 'criminal charge' in article 14, paragraph 1.

3.7 The author states that although the judgement is open to a cassation appeal before the Supreme Court, its possibilities to reassess the conviction and the sentence are very limited. Because a conviction and a sentence are by their nature to a great extent based on the establishment of the facts, review by a higher tribunal which can merely judge on points of law, cannot, according to the author, be regarded as a review of the conviction and the sentence, since only procedural aspects of the evidence can be reassessed.

State party's observations and counsel's comments

4. By submission of 11 April 1997, the State party argues that the communication is inadmissible for failure to exhaust domestic remedies. The State party submits that the Supreme Court, by judgement of 12 March 1997, quashed the judgement of the Amsterdam High Court, on the grounds that it had disregarded evidence. The author's case has been referred to the High Court in The Hague. Since the Court will re-examine the author's case, the State party thus argues that the communication is inadmissible.

5.1 By letter of 23 June 1997, counsel for the author emphasizes that the most important matter at issue in the communication is the question whether or not the tax inspector is allowed to impose serious fines, and that the State party's arguments do not address this question.

5.2 By further letter of 29 December 1997, counsel informs the Committee that the author and the Dutch tax authorities have reached an agreement on the amount of taxes and penalties to be paid by him under Dutch law. As a result of this agreement, the author has withdrawn his appeal from the tax chamber the High Court in The Hague. Accordingly, the author withdraws his claim under article 14, paragraph 5, of the Covenant.

5.3 He maintains however the primary complaint, regarding the question whether or not the tax inspector is allowed to impose serious fines. According to counsel, the fact that the author and the tax inspector have reached an agreement does not impede a decision by the Committee, since a continuation of the case before the Courts would not have any prospect of success and might even result in a higher fine for the author.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the author has withdrawn his claim under article 14, paragraph 5, of the Covenant. This claim is therefore no longer before the Committee.

6.3 The Committee notes that the author of the communication has reached an agreement with the tax authorities over the amount of the penalties to be paid. Accordingly, the Committee is of the opinion that the author cannot claim to be a victim of a violation of article 14, paragraph 1, of the Covenant.

7. The Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 717/1996, Acuña Inostroza et al. v. Chile (Decision adopted on 23 July 1999, sixty-sixth session)*

Submitted by: Acuña Inostroza et al. (represented by Fundación de Ayuda Social de las Iglesias Cristianas)

Alleged victim: The authors

State party: Chile

Date of communication: 18 April 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Adopts the following:

Decision on admissibility

1. The communication is submitted on behalf of Carlos Maximiliano Acuña Inostroza and 17 other individuals, all Chilean citizens who were executed in 1973. It is alleged that Mr. Acuña Inostroza et al are victims of violations by Chile of articles 2; 5; 14, paragraph 1; 15, paragraphs 1 and 2; 16 and 26 of the International Covenant on Civil and Political Rights. They are represented by Nelson G.C. Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas.

The facts as submitted

2.1 On 9 October 1973, a military convoy composed of several vehicles and approximately ninety soldiers drove towards an industrial complex in Panguipulli (Sector Sur del Complejo Maderero Panguipulli). The victims were rounded up by the police (Carabineros) of the towns of Chabranco, Curriñe, Llifen and Futrono, and handed over to the soldiers. Later the same night, the authors were taken to the property of a civilian situated in the mountains. At an unknown hour, the prisoners were taken from the trucks and made to enter the house. They were then led some 500 metres away from the house, and were executed.

2.2 On 10 October 1973, a witness identified several of the victims and testified that the bodies had been mutilated. The bodies remained at the place of execution, and were covered only with leaves and branches. Only 15 days later were they buried, by soldiers, in shallow graves.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case. The texts of individual opinions by two Committee members are appended to the present document.

2.3 Towards the end of 1978 or early in 1979, unidentified civilians arrived at the mountain property and asked the owner to indicate the location of the graves. They dug up the graves and removed the bodies; it is unknown where they were taken to. It is known that the victims had never been judged by a military tribunal, during time of war; they were simply summarily and arbitrarily executed.

2.4 On 25 June 1990, proceedings were initiated in the Criminal Court of Los Lagos (Juzgado Criminal de Los Lagos), with a view to ascertaining the whereabouts of the victims' remains. A special investigating magistrate was nominated (Ministro en Visita extraordinaria), but proceedings were aborted by a petition of 17 August 1990 emanating from a military jurisdiction. The special investigator was ordered to cease his investigations. This was officially confirmed by a decision of 3 September 1990. On 17 January 1991, the conflict of jurisdiction was resolved by the Supreme Court in favour of the military jurisdiction.

2.5 On 24 May 1993, the 4th Military Court of Valdivia (IV Juzgado Militar de Valdivia) formally decided to discontinue the case (sobreseimiento definitivo); on 13 October 1994, the Military Court (Corte Marcial)[15] endorsed this decision. One of the civilian judges dissented, holding that proceedings should be re-initiated as the facts appeared to support evidence to the effect that an act of genocide had been perpetrated.

2.6 A complaint (Recurso de Queja) was then filed with the Supreme Court (Corte Suprema), on grounds of abuse of power on the part of the Military Tribunal and the Military Court, by dismissing a case under the provisions of the Amnesty Decree of 1978. On 24 October 1995, the Supreme Court dismissed the complaint.

The complaint

3.1 Before the Supreme Court, the case was based on violations by the Chilean authorities both of national law and international conventions. Reference was made in this context to the 1949 Geneva Conventions, in force for Chile since April 1951, under which certain illicit acts committed during an armed conflict without international dimensions, are not subject to an amnesty. In this respect, it was alleged that the events under investigation had taken place during a state of siege ("Estado de sitio en grado de 'Defensa Interna'") in Chile. Counsel alleges that by their acts, the present Chilean authorities are condoning, and have become accessories to, the acts perpetrated by the former military regime.

3.2 It is alleged that, regardless of how the events in question may be defined, i.e. whether under the Geneva Conventions or under article 15, paragraph 2, of the Covenant, they constitute acts or omissions which, when committed, were criminal acts according to general principles of law recognised by the community of nations, and which may not be statute-barred nor unilaterally pardoned by any State. Counsel states that with the application of the amnesty law, Decree no. 2191 of 1978, Chile has accepted the impunity of those responsible for these acts. It is alleged that the State is renouncing its obligation to investigate international crimes, and to bring those responsible for them to justice and thus determine what happened to the victims. This means that fundamental rights of the authors and their families have been violated. Counsel claims a violation of article 15, paragraph 2, of the Covenant, in that criminal acts have been unilaterally and unlawfully pardoned by the State.

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[15] Counsel explains that this Court is made up of five judges; three are officers, one each from the army, the air force and the Carabineros, the other two are civil judges from the Santiago Court of Appeal.

3.3 Counsel alleges that the application of the amnesty law No.2.191 of 1978 deprived the victims and their families of the right to justice, including the right to a fair trial and to adequate compensation for the violations of the Covenant.[u] Counsel further alleges a violation of article 14 of the Covenant, in that the victims and their families were not afforded access on equal terms to the courts, nor afforded the right to a fair and impartial hearing. Since the cases were remitted to the military courts, the principle of equality of arms was violated.

3.4 To counsel, the decision of the military tribunals not to investigate the victims' deaths amounts to a violation of article 16 of the Covenant, i.e. failure to recognize the victims as persons before the law.

3.5 As to the reservation entered by Chile upon ratification of the Optional Protocol in 1992, it is alleged that although the events complained of occurred prior to 11 March 1990, the decisions challenged by the present communication are the judgments of the Supreme Court of October 1995.

State party's observations and counsel's comments

4.1 In submissions dated 6 December 1996, 12 February 1997 and 9 February 1998, the State party provides a detailed account of the history of the cases and of the amnesty law of 1978. It specifically concedes that the facts did occur as described by the authors. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these was the so-called "Baños de Chihuio" incident, during which Mr. Acuña Inostroza and the others were killed. The State party gives a detailed account of investigations into this incident.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (Consejo de Seguridad Nacional) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in

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[u] In this respect, reference is made to the Inter-American Commission's decision in the Velasquez Rodriguez case.

Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body - the so-called "*Corporación Nacional de la Verdad y Reconciliación* - continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The "Corporación Nacional" presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation to victims of the former military regime is Law No.19.123 of 8 February 1992, which:

- sets up the Corporación Nacional and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;
- mandates the Corporación Nacional to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;
- fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;
- establishes that the compensation pensions are readjustable, much like the general system of pensions;

- grants a "compensation bonus" equivalent to 12 monthly compensation pension payments;

- increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;

- decrees that the education of children of victims of the former regime will be borne by the State, including university education;

- lays down that the children of victims of the former regime may request to be exempted from military service.

In accordance with the above guidelines, the relatives of Mr. Acuña Inostroza and the other victims have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communication. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No.19.123 constitute appropriate remedies within the meaning of article 2 of the Covenant.

4.11 By a further submission dated 29 July 1997, the State party reaffirms that the real obstacle to the conclusion of investigations into disappearances and summary executions such as in the authors' cases remains the Amnesty Decree of 1978 adopted by the former military government. The current Government cannot be held responsible internationally for the serious human rights violations which are at the basis of the present complaints. Everything possible to ensure that the truth be established, that justice be done and that compensation be awarded to the victims or their relatives has been undertaken by the present Government, as noted in the previous submission(s). The desire of the Government to promote respect for human rights is reflected in the ratification of several international human rights instruments since 1990, as well as the withdrawal of reservations to some international and regional human rights instruments which had been made by the military regime.

4.12 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the authorities, with a view to recovering, within the limits of the law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the Corporación Nacional de Reparación y Reconciliación.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take measures to mitigate or eliminate the effects of the amnesty decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action)to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communication fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on Human Rights and the Covenant, implicitly abrogated all (domestic) norms incompatible with these instruments; this would include the Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions, as incompatible with and in violation of the American Convention on Human Rights.

5.6 In additional comments, counsel reiterates his allegations as summarized in paragraphs 3.2 and 3.3 above. What is at issue in the present case is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it cannot investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant case, this would imply ascertaining the burial sites of the victims, why they were murdered, who killed them or ordered them to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the authors, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration: "In ratifying the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990."

6.3 The Committee notes that the authors also challenge the judgments of the Supreme Court of Chile of 24 October 1995 denying their request for the revision of earlier adverse decisions rendered on their applications by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the deaths of the authors occurred prior to the international entry into force of the Covenant, on 23 March 1976. Hence, these claims are inadmissible *ratione temporis*. The Supreme Court judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973. Consequently, the communication is inadmissible under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accessing to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The question of whether the next of kin of the executed victims might have a valid claim under the Covenant notwithstanding the inadmissibility of the instant communication is not before the Committee and need not be addressed in these proceedings.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, and to the authors' counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Hipólito Solari Yrigoyen
(dissenting)

I hold a dissenting opinion on paragraph 6.4, which should have read as follows: "With regard to the author's claim under article 16 of the Covenant, the Committee notes that the communication concerns the violation of the author's right to recognition everywhere as a person before the law, as a consequence of the lack of investigation of his whereabouts or location of the body. The Committee considers this a fundamental right to which anyone is entitled, even after his death, and one that should be protected whenever its recognition is sought. It therefore does not need to consider whether the declaration made by Chile upon accession to the Optional Protocol should be regarded as a reservation or a mere declaration, and can conclude that it is not precluded *ratione temporis* from examining the author's communication on the matter.

Regarding the claim under article 14, paragraph 1, of the Covenant, it is submitted that in the author's case the trial was not impartial in determining whether a violation of article 16 of the Covenant had occurred. The Committee considers it has been sufficiently substantiated for admissibility purposes that the author's case was not heard by an independent tribunal."

(Signed) H. Solari Yrigoyen

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Christine Chanet concerning communications Nos. 717/1996 and 718/1996

I challenge the decision taken by the Committee, which, in dealing with the two communications, dismissed the applicants on the grounds of the *ratione temporis* reservation lodged by CHILE at the time of its accession to the Optional Protocol.

In my view the question could not be addressed in this manner, in view of the fact that judicial decisions taken by the State party were adopted after the date it had specified in its reservation and that the problem raised in connection with article 16 of the Covenant relates to a situation which, as long as it is not permanently ended, has long-term consequences.

In the case in question, even if the actual circumstances referred to in the two communications diverge, the attitude of the State regarding the consequences to be drawn from the disappearances necessarily raised a question as regards article 16 of the Covenant.

Under article 16, everyone has the right to recognition as a person before the law.

While this right is extinguished on the death of the individual, it has effects which last beyond his or her death; this applies in particular to wills, or the thorny issue of organ donation;

This right survives *a fortiori* when the absence of the person is surrounded by uncertainty; he or she may reappear, and even if not present, does not cease to exist under the law; it is not possible to substitute civil death for confirmed natural death;

These observations do not imply that this right is of unlimited duration: either the identification of the body is incontestable and a declaration of death can be made, or uncertainty remains concerning the absence or the identification of the person and the State must lay down rules applicable to all these cases; it may, for example, specify a period after which the disappeared person is regarded as dead.

This is what the Committee should have sought to find out in this particular case by examining the matters in depth.

(*Signed*) Christine Chanet

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 718/1996, Pérez Vargas v. Chile (Decision adopted on 26 July 1999 (sixty-sixth session)*

Submitted by: Mrs. María Otilia Vargas Vargas (represented by Fundación de Ayuda Social de las Iglesias Cristianas)

Alleged victim: Mrs. María Otilia Vargas and her son Mr. Dagoberto Pérez Vargas

State party: Chile

Date of communication: 3 May 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Maria Otilia Vargas Vargas acting also on behalf of her son, Dagoberto Pérez Vargas, a Chilean citizen who disappeared in 1973, and was later confirmed to have been killed that year. It is alleged that Mr. Dagoberto Pérez Vargas was a victim of violations by Chile of articles 2; 5; 14, paragraph 1; 15, paragraphs 1 and 2; 16 and 26 of the International Covenant on Civil and Political Rights, and that the rights of Mrs. Vargas Vargas have been violated as a family member. The alleged victims are represented by Nelson G.C. Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas.

The facts as submitted

2.1 On 16 October 1973, an armed confrontation occurred between members of the now defunct DINA (Dirección de Inteligencia Nacional) and members of the rebel group MIR (Movimiento de Izquierda Revolucionario) of which Dagoberto Pérez was a member. It was assumed that he was killed in the encounter, as his body was never recovered, but the only news about his fate that his family was able to gather was unofficial. None of the victim's relatives were ever notified of the whereabouts of the body, the circumstances of his death, where it had occurred or who had been responsible.

2.2 Proceedings to establish the circumstances of Mr. Pérez Vargas' death were initiated in the Metropolitan Regional Court of Santiago (Juzgado de Letras de

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case. The text of an individual opinion by two Committee members is appended to the present document.

Talagante, Región Metropolitana) on 28 April 1991. A criminal suit on charges of aggravated kidnapping resulting in murder and illegal association were filed against X. On 24 August 1993, the Magistrate on the Talagante Court declared that he had no competence to consider the case and transferred the case to a military jurisdiction, as two military officers appeared to have investigated the site of the incident. Counsel notes that the Court of Appeal of San Miguel subsequently remitted the appeal to a military jurisdiction.

2.3 On 24 August 1994, the 2nd Military Tribunal of Santiago (II Juzgado Militar de Santiago) decreed that the case be formally discontinued (Sobreseimiento definitivo) pursuant to Law 2.191 of 1978, without going into further investigations. On 9 May 1995, the Military Court (Corte Marcial) endorsed this decision. One of the civilian judges on the court dissented, arguing that the proceedings should be returned to the investigating phase.

2.4 A complaint (Recurso de Queja) was filed with the Supreme Court on grounds of abuse of power by the Military Tribunal and the Military Court, which had dismissed the case under the provisions of the 1978 Amnesty Decree. On 2 October 1995, the Supreme Court dismissed the complaint, without giving reasons. With this, counsel argues, available domestic remedies have been exhausted.

The complaint

3.1 Before the Supreme Court, the case was based on violations by the Chilean authorities both of national law and international conventions. Reference was made in this context to the 1949 Geneva Conventions, in force for Chile since April 1951, under which certain illicit acts committed during an armed conflict without international dimensions, are not subject to an amnesty. In this respect, it was alleged that the events under investigation had taken place during a state of siege ("Estado de sitio en grado de 'Defensa Interna'") in Chile. Counsel alleges that by their acts, the present Chilean authorities are condoning, and have become accessories to, the acts perpetrated by the former military regime.

3.2 It is alleged that, regardless of how the events in question may be defined, i.e. whether under the Geneva Conventions or under article 15, paragraph 2, of the Covenant, they constitute acts or omissions which, when committed, were criminal acts according to general principles of law recognised by the community of nations, and which may not be statute-barred nor unilaterally pardoned by any State. Counsel states that with the application of the amnesty law, Decree no. 2191 of 1978, Chile has accepted the impunity of those responsible for these acts. It is alleged that the State is renouncing its obligation to investigate international crimes, and to bring those responsible for them to justice and thus determine what happened to the victims. This means that fundamental rights of the author and his family have been violated. Counsel claims a violation of article 15, paragraph 2, of the Covenant, in that criminal acts have been unilaterally and unlawfully pardoned by the State.

3.3 Counsel alleges that the application of the amnesty law No.2.191 of 1978 deprived the victim and his family of the right to justice, including the right to a fair trial and to adequate compensation for the violations of the Covenant.[17] Counsel further alleges a violation of article 14 of the Covenant, in that the victim and his family were not afforded access on equal terms to the courts, nor afforded the right to a fair and impartial hearing. Since the case was remitted to the military courts, the principle of equality of arms was violated.

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[17] In this respect, reference is made to the Inter-American Commission's decision in the Velasquez Rodriquez case.

3.4 To counsel, the decision of the military tribunals not to investigate the victim's death amounts to a violation of article 16 of the Covenant, i.e. failure to recognize the victim as a person before the law.

3.5 As to the reservation entered by Chile upon ratification of the Optional Protocol in 1992, it is alleged that although the events complained of occurred prior to 11 March 1990, the decision challenged by the present communication is the judgment of the Supreme Court of October 1995.

State party's observations and counsel's comments

4.1 In submissions dated 6 December 1996, 12 February 1997 and 9 February 1998, the State party provides a detailed account of the history of the cases and of the amnesty law of 1978, including information on the details of the death of Mr. Pérez Vargas. It specifically concedes that the facts did occur as described by the author's counsel. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these was the author's case. It is noted that his case is set out in Part II, Vol. I of the Commission's final report; the conclusion was that his death was attributable to 'political violence'.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (Consejo de Seguridad Nacional) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body - the so-called "*Corporación Nacional de la Verdad y Reconciliación*" - continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The "Corporación Nacional" presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation to victims of the former military regime is Law No.19.123 of 8 February 1992, which

* sets up the Corporación Nacional and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;

* mandates the Corporación Nacional to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;

* fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;

* establishes that the compensation pensions are readjustable, much like the general system of pensions;

* grants a "compensation bonus" equivalent to 12 monthly compensation pension payments;

* increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;

* decrees that the education of children of victims of the former regime will be borne by the State, including university education;

* lays down that the children of victims of the former regime may request to be exempted from military service.

In accordance with the above guidelines, the relatives of Mr. Pérez Vargas have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communication. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No.19.123 constitute appropriate remedies within the meaning of article 2 of the Covenant.

4.11 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the authorities, with a view to recovering, within the limits of the law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the Corporación Nacional de Reparación y Reconciliación.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take measures to mitigate or eliminate the effects of the Amnesty Decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action)to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communication fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on Human Rights and the Covenant, implicitly abrogated all (domestic) norms incompatible with these instruments; this would include the Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions, as incompatible with and in violation of the American Convention on Human Rights.

5.6 In additional comments, counsel reiterates his allegations as summarized in paragraphs 3.2 and 3.3 above. What is at issue in the present case is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it cannot investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant case, this would imply ascertaining the burial sites of the victim, why he was murdered, who killed him or ordered him to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the author, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration: "In ratifying the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990".

6.3 The Committee notes that the author also challenges the judgment of the Supreme Court of Chile of 2 October 1995 denying the request for the revision of earlier adverse decisions rendered in respect to Mr. Pérez Vargas' application by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the death of Mr. Pérez Vargas occurred prior to the international entry into force of the Covenant, on 23 March 1976, hence, these claims are inadmissible *ratione temporis*. The Supreme Court judgement of 1995 cannot be regarded as a new event that could affect the rights of a person who was killed in 1973. Consequently, the communication is inadmissible in respect of Mr. Pérez Vargas, under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accession to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The Committee notes that the communication has been submitted by Mrs. María Otilia Vargas Vargas, the mother of Mr. Pérez Vargas and that the State party has addressed her status as a victim of alleged violations of the Covenant. With the dismissal of the author's petition by the Supreme Court in October 1995, all domestic remedies available to the author have been exhausted. The State party itself has argued that Amnesty Decree 2.191 of 1978 cannot be abrogated or declared null and void, which must be understood as meaning that any judicial challenge of the Decree, constitutionally or otherwise, would inevitably fail. The Committee thus concludes that the requirements of article 5, paragraph 2 (b), of the Optional Protocol have been met in the present case in relation to Mrs. Maria Otilia Vargas Vargas.

6.6 The Committee notes that the events complained of by Mrs. Vargas Vargas occurred prior to the entry into force of the Optional Protocol for Chile. However, the decision challenged by her is the judgment of the Supreme Court of Chile of October 1995, i.e. acts which occurred after the entry into force of the Optional Protocol for the State party. Thus, the Committee is not precluded *ratione temporis* from considering the communication of Mrs. Vargas Vargas.

6.7 The Committee notes that the claims made on behalf of Mrs. Vargas Vargas are general in character and have merely been derived from the claims made in respect of Mr. Pérez Vargas. She has not specified which of her rights under the Covenant have been violated through the Supreme Court judgement of 1995. Consequently, the Committee finds that the claims made in respect of Mrs. María Otilia Vargas Vargas have not been sufficiently substantiated for purposes of admissibility and the communication is inadmissible under article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that the decision shall be communicated to the State party, and to the author and her counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Christine Chanet concerning communications Nos. 717/1996 and 718/1996, co-signed by Fausto Pocar concerning communication No. 718/1996

I challenge the decision taken by the Committee, which, in dealing with the two communications, dismissed the applicants on the grounds of the ratione temporis reservation lodged by CHILE at the time of its accession to the Optional Protocol.

In my view the question could not be addressed in this manner, in view of the fact that judicial decisions taken by the State party were adopted after the date it had specified in its reservation and that the problem raised in connection with article 16 of the Covenant relates to a situation which, as long as it is not permanently ended, has long-term consequences.

In the case in question, even if the actual circumstances referred to in the two communications diverge, the attitude of the State regarding the consequences to be drawn from the disappearances necessarily raised a question as regards article 16 of the Covenant.

Under article 16, everyone has the right to recognition as a person before the law.

While this right is extinguished on the death of the individual, it has effects which last beyond his or her death; this applies in particular to wills, or the thorny issue of organ donation;

This right survives a fortiori when the absence of the person is surrounded by uncertainty; he or she may reappear, and even if not present, does not cease to exist under the law; it is not possible to substitute civil death for confirmed natural death;

These observations do not imply that this right is of unlimited duration: either the identification of the body is incontestable and a declaration of death can be made, or uncertainty remains concerning the absence or the identification of the person and the State must lay down rules applicable to all these cases; it may, for example, specify a period after which the disappeared person is regarded as dead.

This is what the Committee should have sought to find out in this particular case by examining the matters in depth.

(Signed) Christine Chanet

(Signed) Fausto Pocar

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 724/1996, Mazurkiewiczova v. Czech Republic (Decision adopted on 26 July 1999, sixty-sixth session)*

Submitted by: Jarmila Mazurkiewiczova

Alleged victim: The author and her father, Jaroslav Jakes

State party: Czech Republic

Date of communication: 22 January 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Jarmila Mazurkiewiczova, a Czech citizen, currently residing in Brno, Czech Republic. She submits the communication on her own behalf and in name of her father, Jaroslav Jakes, who was born in 1897 and died in 1979. She claims to be a victim of human rights violations by the Czech Republic, without invoking specific articles of the Covenant.

Facts as submitted by the author

2.1 The author's father, Jaroslav Jakes, was a Czech citizen and businessman, married to a German woman. He owned a hotel with restaurant in Brno. After the Second World War, he was accused of being a collaborator and detained. Later however, he was acquitted and received his certificate of reliability.

2.2 While Mr. Jakes' case was being investigated, his hotel was placed under national administration. On 27 January 1948, after his name had been cleared, Mr. Jakes requested the abolition of this measure. But on 17 January 1950, the National Committee of Brno issued an order (No. 252.067/46-VII/3) confiscating Mr. Jakes' property in application of presidential decree No. 108/1945. The author explains that as of 1950, her father was seen as a capitalist and thus an enemy of the regime.

2.3 Following the publication of Law No. 87/1991, regulating the restitution of property unlawfully taken by the Communist regime, the author's mother, who was then still alive but subsequently died in April 1992, initiated the procedure to regain her property rights. She argued that decree 108/1945 had not been applied correctly in Mr. Jakes' case, but had been abused to confiscate his property because he was an opponent of the regime.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by Committee member Nisuke Ando is appended to the present document.

2.4 When her mother died, the author, as her heir, continued the procedure she had initiated. Her request was rejected on the ground that the law did not apply to confiscation under the Benes decrees, nor to confiscation occurring prior to 25 February 1948.

2.5 The author appealed the judgment of the City Court of Brno to the Regional Court of Brno, and further to the Supreme Court and then to the Constitutional Court, which rejected her claim in 1994. With this all domestic remedies are said to have been exhausted.

The complaint

3. The author argues that her father has been unjustly treated on suspicion that he was a collaborator. She further claims that in other similar cases, property has been restored by the Constitutional Court on the ground that the presidential decree had been abused to confiscate property for political reasons. She requests the Committee to determine that her father was not a collaborator and that the Benes decree was unlawfully applied to him.

State party's observations

4.1 By submission of 14 February 1997, the State party argues that the communication is inadmissible.

4.2 According to the State party, Mr. Jakes' property was confiscated under decree 108/1945 on 5 October 1946, and the confiscation was reaffirmed on 17 January 1950. Law No. 87/1991 applies only to confiscations after 25 February 1948, and is thus not applicable in the author's case, as affirmed by the courts.

4.3 The State party notes that the author filed an application with the European Commission of Human Rights. The application was declared inadmissible.

4.4 The State party submits that confiscation orders may be classified as implying an abuse of the decree for the purposes of political persecution only in cases where it is proven beyond doubt that the person concerned did not come under any of the categories defined in the decree. In such cases, the property is deemed to have devolved to the State by virtue of an administrative act effected in consequence of political persecution or actions violating the generally recognized human rights and freedoms and the former owners have the legal right to restitution, if the confiscation order was issued in the period to which Law No. 87/1991 applies, i.e. after 25 February 1948.

4.5 In the instant case, the confiscation order was issued in 1946, thus prior to the decisive period, and the property remained in possession of the State. The second confiscation order, reaffirming the previous one, is thus irrelevant for purposes of Law No. 87/1991.

4.6 With regard to the author's claim that the confiscation order affected her father's personal integrity and reputation, the State party argues that the claim is inadmissible ratione temporis.

4.7 With regard to the author's reference to other cases, the State party explains that the Constitutional Court in two cases has ruled in favour of a person whose property was unlawfully confiscated under the Benes decrees. However, in those cases the confiscation order was issued after 25 February 1948, and the courts where thus competent to review whether the confiscation orders complied with the decree. Since the evidence showed that it did not, and that the decree was abused in the context of political persecution, the transfers of the property were not effected ex lege on 30 October 1945. The Constitutional Court therefore annulled the decisions of the lower courts which had refused to review the legality of the confiscation orders, considering that they had violated the right to fair trial.

4.8 The State party recalls that in the author's case, the confiscation order was issued in 1946, before the decisive period of Law No. 87/1991, and can thus not be reviewed. Since the author in her application to the Constitutional Court, did not explain how her constitutional rights were allegedly violated, the Constitutional Court could do nothing but dismiss her complaint. The State party concludes that the communication is inadmissible for failure to exhaust domestic remedies, as the Constitutional Court never made a finding on the merits of the author's case.

4.9 The State party further argues that the communication is inadmissible ratione materiae in so far as it invokes the right to property, which is not protected by the Covenant.

4.10 The State party further notes that the main issue in the communication is the author's disagreement with the legal views expressed by the courts. In this context, the State party argues that the Human Rights Committee is not competent to consider whether the domestic authorities and courts correctly interpret and apply national legislation, and that the communication is thus inadmissible ratione materiae.

4.11 The State party also challenges the admissibility of the communication ratione temporis, as the act affecting the father's right to property dates from before the entry into force of the Covenant for the Czech Republic. In this context, the State party submits that the courts were not competent under Law No. 87/1991 to examine the ownership and the manner in which it was extinguished, and that their decisions can thus not violate the right to property or the author's right to inheritance.

Author's comments

5. In her comments, the author provides evidence to show that her father was not a collaborator, but loyal to the Czech Republic. She requests the Committee to rehabilitate her father and states that she has exhausted all available domestic remedies.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The author complains that the confiscation of her father's property was a result of political persecution and that decree No. 108/1945 was unlawfully applied to him. The Committee recalls that the right to property is not protected by the Covenant,[18] and that it is thus incompetent ratione materiae to consider any alleged continuing violations of this right after the entry into force of the Covenant and Optional Protocol for the Czech Republic.

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[18] See also the Committee's decision on communication No. 544/1993 (K. J. L. v. Finland), declared inadmissible on 3 November 1993.

6.3 In so far as the author's communication may raise issues under article 26 of the Covenant, the Committee notes that the author has failed to bring the claims of discrimination before the Constitutional Court. This part of the communication is therefore inadmissible for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible under articles 3 and 5(2)(b) of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinion by Nisuke Ando

(partly dissenting)

I am unable to concur with the Committee's conclusion that the author's claim be declared inadmissible on the two grounds: one, on the basis of ratione materiae; the other, on the basis of non-exhaustion of domestic remedies.

While I agree with the first ground, the Committee simply notes that the author has failed to bring the claim of discrimination before the Constitutional Court and concludes that the communication is inadmissible. In this connection, the State party contends that the Committee is not competent to consider whether the domestic authorities and courts correctly interpret and apply national legislation. This contention causes me to wonder if the author could have raised the issue under article 26 of the Covenant before the domestic courts. Consequently, the Committee should have examined the possibility and availability for the author to raise that issue at domestic courts before it concluded that the claim is inadmissible.

[Signed] Nisuke Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 737/1997, Lamagna v. Australia (Decision adopted on 7 April 1999, sixty-fifth session)*

Submitted by:	Michelle Lamagna
Alleged victim:	The author
State party:	Australia
Date of communication:	30 October 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. Michelle Lamagna, matron and owner of Villa Magna Nursing Care Centre in NSW Australia. No specific violation of the International Covenant on Civil and Political Rights is alleged.

The facts as submitted by the author

2.1 The Government of the Commonwealth of Australia operates a subsidy scheme under the National Health Act 1953 (Commonwealth) ("the Act") by which the proprietors of approved nursing homes are paid a benefit in respect of each approved patient for each day the patient receives nursing care in the home.

2.2 In June 1991 Mrs. Lamagna and her husband, as Lamagna Enterprises Pty, purchased a nursing home. In 1991/92 the Commonwealth Department of Human Services and Health conducted an audit ("validation") of the subsidies that it had paid to the previous owner of the nursing home in 1986/87 and found an overpayment of subsidies. The system of funding adopted under the Act in 1987 meant that this error had led to additional overpayments in the subsequent years 1987/88 to 1990/91. The amount of these overpayments was determined in 1991/92 to be A$94,912. Also in 1991/92 a further overpayment was found for the 1990/91 financial year. This followed the submission by the previous owner to the Department of the form relating to employment of staff. This arrangement had been agreed upon by the vendor and purchaser in the agreement of sale. This overpayment was calculated to be A$50,404.

2.3 In April 1992 the Department notified Mrs. Lamagna of the amount of overpayments from the 1986/87 to 1990/91 period and that it would recover them from future subsidy payments to her. In July 1992 the Department notified her of the overpayment from the 1990/91 financial year and that it would recover this also from future subsidy payments. Apparently, legal advice received by the Department was that, at that time, overpayments did not constitute a debt that could be recovered through the courts since it was not clear that the assessment of overpayment established a liability on the part of either of the previous proprietor or Mrs. Lamagna.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the consideration of the case.

2.4 Mrs. Lamagna's complaint is that the Department did not disclose to her that these so-called "negative loadings" existed on the nursing home, even though she presented a letter from the vendor to the Department authorizing the Department to disclose all relevant matters to her.

2.5 It is worth noting that the Commonwealth has since amended the law to provide for a compulsory notice to the Government of the sale of a nursing home coupled with a compulsory waiting period of 90 days. This amendment will enable any loadings to be detected by the Department and declared, thus protecting the interests of purchasers. A further amendment is the provision for prospective purchasers to have access to the future fee scale of a nursing home.

2.6 It is apparent that Mrs. Lamagna has explored a range of avenues of review. According to the report of the Ombudsman the first of these was an unsuccessful representation to the Minister of the Department.

2.7 The second was legal action against the Department (Lamagna Enterprises Pty. Ltd. V the Secretary of the Department of Community Services and Health (1993) 40 FCR 235). In this litigation Mrs. Lamagna sought an order setting aside the determination by the Secretary of the new scale of fees for the nursing home which took into account the negative loadings on the nursing home. This legal action was also unsuccessful, the judge finding that the Department had acted lawfully.[19]

2.8 Mrs. Lamagna has taken no further legal action, stating that she cannot afford further action, being near bankruptcy, and that no legal aid is available to her.

2.9 Mrs. Lamagna also made a complaint to the office of the Ombudsman which informed the Department in August 1994 that it believed the Department's administration had been defective and recommended a financial remedy be provided for Mrs. Lamagna. The Department sought legal advice from the Attorney-General's Department which advised that the Commonwealth was not legally liable in respect of the advice it had given. Accordingly, the Department stated that there was nothing more it could do.

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[19] Upon construction of the Act:

- The principle that allowed the Secretary to take these negative loadings into account was not promulgated for an improper purpose. P13 the Judge cited law (Neviskia Pty Ltd v Minister for Community Services (1987) 17 FCR 407) that it is "open to the Minister to formulate principles which require the taking into account of negative loadings calculated in accordance with previous savings, and applying those negative loadings to a new proprietor which bears the necessary degree of relationship to an earlier proprietor ... Here, the necessary degree of relationship is readily to be found in the direct contractual connection between the applicant and the former proprietor."

- The Minister was not acting ultra vires in formulating principles which permitted such a method of recovery [copy pp.13-14]. The Act allowed this.

2.10 The Ombudsman's Office has subsequently completed a report on the investigation into the matter. The Ombudsman makes several findings: that the legislation in force in 1991/92 was unreasonable, as evidenced by the amendments made to it; that the Department's failure to inform Mrs. Lamagna of the validation process when she consulted it prior to purchasing the nursing home was unreasonable; that the information circulated by the Department did not refer to validations and did not tell intending purchasers of the possibility that the Department might reduce the subsidy payable in consequence of overpayments it may have made to the vendor years before; that, on the balance of probabilities, the Department informed Mrs. Lamagna incorrectly that it would recover any overpayments from the vendor; that in relation to the earlier loading of A$94,912 the Department failed to inform the author of the validation process so she could take adequate steps to protect herself; and that in relation to the second loading, since the author was in fact aware that any loading found for that year would be recovered against the subsidy payable, the Department could not be held responsible for the A$50,404 loading. The Ombudsman accordingly made a recommendation that the Department pay Mrs. Lamagna A$94,912 plus interest charged on her overdraft.

2.11 Following the failure of the Department to implement the recommendations of the Ombudsman the report was passed to the Office of the Prime Minister and to the Cabinet. In the author's letter of 20.2.96 it appears that the Cabinet has rejected the Ombudsman's recommendations in September 1995. However, a letter from the Office of the Prime Minister, dated 6.2.96, to the Ombudsman, it states that the matter cannot be dealt with before the election held in mid-March) and that work was being done by Departmental officers to prepare advice and an appropriate response for the incoming Government. Mrs. Lamagna appears to have attempted communication with the new Government (letter 21.3.96) though it is not apparent what response, if any, she has had. Her most recent correspondence indicates that she has now had to close the nursing home and is living abroad.

The complaint

3. The author contends that the facts as described above are unfair, unreasonable and unjust treatment constituting a discrimination and consequently a violation of the Covenant, without invoking any specific articles of the Covenant.

State party's observations and author's comments thereon

4.1 By submission of June 1997, the State party argues that the communication is inadmissible. It contends that the author has provided no basis for her claim, that she has suffered any injustice within the meaning of the Covenant.

4.2 The State party argues that the communication should be declared inadmissible ratione personae on the grounds that Mrs Lamagna as representative of Lamagna Enterprises Pty Limited, lacks standing before the Committee since articles 1 and 2, of the Optional Protocol expressly limit the right to submit a communication to individuals. The state party notes that the author is the proprietor of the Villa Magna Nursing Care Center. She is also a director of the company Lamagna Enterprises Pty Limited which controls Villa Magna Nursing Care Centre. It contends that the Australian Government's action under the National Health Act 1953 to recover overpayments was an action for recovery against the company Lamagna Enterprises Pty Limited and not against the author as a private individual, accordingly, the communication has not been submitted by the author as a private individual but as director of the company Lamagna Enterprises Pty Limited, and should therefore be ruled inadmissible ratione personae, reference is made to the Committee's jurisprudence in this respect.[20]

4.3 The State party further argues that the communication should be ruled inadmissible ratione materiae under article 2, of the Optional Protocol on the grounds that the lawful exercise of a statutory power to recover an overpayment from an incorporated company is not referable to any rights set forth in the Covenant and does not engage the jurisdiction of the Committee.

4.4 Furthermore, the State party submits that, in essence, the author is asking the Committee to rule on whether the National Health Act 1953 is compatible with the Covenant. It argues that it is the Committee's jurisprudence that under the Optional Protocol the Committee cannot examine in abstracto the compatibility with the Covenant of laws and practices of a State. It contends that in so far as the communication seeks to raise the compatibility of domestic legislation with the Covenant the communication is inadmissible.

4.5 The State party finally argues that the communication is inadmissible ratione materiae under article 3, of the Optional Protocol on the grounds that, in effect the author is seeking a review of the Federal Court's decision in Lamagna Enterprises Pty Limited v. The Secretary of the Department of Community Service and Health. If Lamagna Enterprises Pty Limited wishes to challenge the interpretation of the National Health Act 1953 the proper course of action would be to investigate the possibility of an appeal to the Full Federal Court on a point of law. To the extent that the author's claim relates to the Federal Court's interpretation of the National Health Act 1953, the author's claim does not come within the competence of the Committee.

4.6 The State party concedes that the Federal Ombudsman recommenced that whilst the negative loadings were valid under the National Health Act of 1953, they were unjust and unreasonable and the author should be refunded for the amounts recovered. However, both the Minister for Finance and the Minister for Family Services, advised the Prime Minister against compensation. It was on this advice that the Prime Minister acted when he informed the Ombudsman's Office, accordingly, on 16 December 1996.

5. In a letter dated 3 October 1997, the author reiterated her claim of unjust and unfair treatment by the state authorities since it was a governmental department which held the monopoly of the information in respect of nursing homes that denied her the information that was later used against her by that same department to claim a debt of over payment made to the previous owner of the nursing home.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's contention that the communication should be declared in inadmissible ratione personae. In this respect, it notes that the author has submitted the communication claiming to be a victim of a violation of her rights under the Covenant, to be treated justly and fairly, because a governmental department denied her information which it later used against her.

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[20] See communication No. 360/1989 (T.N.T. Ltd v. Trinidad and Tobago) and communication No. 361/1989 (Blast Co. v. Trinidad and Tobago).

However, the author who purchased the nursing as an enterprise is essentially claiming before the Committee violations of the rights of her company, which has its own legal personality. All domestic remedies referred to in the present case were in fact brought before the Courts in the name of the company, and not of the author, furthermore the author has not substantiated that her rights under the Covenant have been violated. Under article 1 of the Optional Protocol only individuals may submit a communication to the Human Rights Committee.[21] The Committee considers that the author, by claiming violations of her company's rights, which are not protected by the Covenant has no standing within the meaning of article 1, of the Optional Protocol, in respect of the complaint related to her company and that no claim related to the author personally has been substantiated for purposes of article 2 of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[21] See the Committee's decision on communication No. 502/1992 (Sharif Mohamed v. Barbados), declared inadmissible on 31 March 1994.

K. Communication No. 739/1997, Tovar v. Venezuela (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by: Larry Salvador Tovar Acuña

Alleged victim: The author

State party: Venezuela

Date of communication: 21 June 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Larry Salvador Tovar Acuña, a Venezuelan citizen born in 1958, an industrial engineer. At the time of submission of his communication he was detained at the Internado Judicial "El Rodeo", in Guatire, Estado de Miranda, Venezuela. He claims to be the victim of violations by Venezuela of the International Covenant on Civil and Political Rights. No articles are specifically invoked, but it would appear that articles 7; 9, paragraphs 3 and 4; 10, paragraph 1; 14, paragraphs 1, 2, 3 (c) and paragraph 7; and 17, paragraph 1, of the Covenant are at issue.

The facts as submitted by the author

2.1 On 31 March 1989, the author was arrested at his home when five policemen came with a search warrant. They searched the house allegedly looking for drugs. The public prosecutor and two witnesses were present.

2.2 On 2 April 1989, a second search was carried out, this time without a search warrant. The public prosecutor was present but no witnesses accompanied the police. The police claim that USD 200,000 were found, wrapped up in packages similar to those used for transporting drugs.

2.3 The author states that he has been set up by the police (Policia Técnica Judicial). He claims that the police have stolen his possessions (house, car, money etc) and have tried to link him to a couple of drug dealers who had been caught at Caracas International Airport with 20 kgs of cocaine. Mr. Tovar states that he is being victimized because the Venezuelan fight against drug trafficking is ineffective. In this respect he points out that none of the drug barons are in prison, yet when he submitted his case to the Human Rights Committee he had served seven years, without there being any evidence against him.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

2.4 The author further submits that all his belongings and those of his family, his father and an aunt, have been confiscated by corrupt police officers, and sold off. The proceeds have been pocketed by the police and judge mafia. He states that the officers involved in the theft of his and his family's possessions have been expelled from the PTJ (Policia Técnica Judicial). In this respect, he submits a report from the Drug commission (Comisión Permanente Contra el uso indebido de las Drogas) of the Venezuelan Congress to the Court of First Instance which contained various allegations of misconduct by certain police officers who were dismissed from the force.

The complaint

3.1 The author claims that he has been in prison for over six years without having been tried.[22]

3.2 The author further claims that the conditions of detention in Venezuela are exceedingly harsh, that he has been tortured and ill-treated. In this respect, he states that he was beaten by the National Guard, that the PTJ subjected him to electrical shocks and used a plastic bag to try to suffocate him. Handcuffs were used to hang him from his wrists. The beatings he received have resulted in permanent damage to his knees and kidneys. The author claims that he has been held in solitary confinement, with the lights on 24 hours a day, making sleep impossible.

3.3 He alleges that his life is being threatened since the "judicial mafias" want him dead, so he cannot denounce their actions. In this respect, the author refers to various newspaper articles where it was stated that the author had died while in prison. He further alleges that he sent the President of the Republic a copy of his file, in 1991, to prove his innocence. He states that this was the basis for the Presidential pardon he received.

3.4 On 21 October 1993, the author was granted a presidential pardon, which was published in the Official Journal (Gaceta Oficial de la República de Venezuela) as presidential decree No. 35.322. On 27 October 1993, by decree No 35.326 the President revoked the pardon granted six days earlier. The author's release complied with all the requirements of release including the corresponding notification to the judge responsible for the case. A new warrant was issued for his arrest, he was apprehended and returned to prison. In this respect, he states that the cancellation of his Presidential pardon was an illegal act, since the President cannot revoke a Pardon. Pardons may only be revoked by submitting the issue to the Supreme Court, and the author claims that this was never done. Furthermore, the author alleges that the cancellation of his pardon is contrary to law, as it entails a retroactive application of a law, which is not beneficial to the accused.

3.5 The author's father, who is 80 years old, and the President of the Republic's secretary were imprisoned for allegedly having mislead the President into signing the author's pardon. Mr. Tovar states that it was the judicial mafias' pressure that forced the President to revoke his pardon and arrest two innocent people. He further states that under Venezuelan law a father may not be prosecuted for his son's crimes, and that this is exactly what has been done to his father.

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[22] However he also claims that the judicial authorities (whom he calls the "Judicial Mafias") are "playing around" with first instance judgements and that the Superior Court has not decided in his case. It would appear therefore that the author has been convicted, but has not been able to appeal his conviction.

3.6 The author at the time of submission of his complaint has been in prison for seven years and nine months. He claims that during the time he has been in prison he has accumulated five years and 2 months to be credited to him for remission work. This brings his time in prison to a total of 12 years and eleven months, whereas the maximum sentence he could receive would be 10 years and six months. According to the author he has been in prison for 2 years in excess of his possible sentence. This is said to constitute a violation of international law. Furthermore, the author contends that the criminal action against him is statute barred, consequently his case should be dismissed. In this respect, the author refers to the Venezuelan "Drug Law" (Ley Orgánica de Sustancias Estupefacientes y Psicotrópicas), where he claims it is held that if a process takes over five years, without a sentence being handed down the criminal action becomes statute barred, and the case should be dismissed.

3.7 On 27 February 1996, a request for Habeas Corpus was submitted on behalf of the author, to the Supreme Court; to date no response has been received.

3.8 The author claims that he should have been granted the benefit of bail in accordance with Venezuelan law. In this regard, the law states that an individual will be granted bail if within one year of having been sentenced the Superior Court does not confirm the sentence. The author claims that he has been discriminated against in the application of this legislation.

3.9 The author alleges that he has not been provided with legal aid, as prescribed by law, in respect of his case before the Supreme Court where he challenges the cancellation of his presidential pardon.

3.10 The author claims that with his appeal to the Supreme Court for bail and the Habeas Corpus motion he has exhausted domestic remedies, in respect of any criminal proceedings against him in what he calls his regular defence. Furthermore, he considers that any criminal proceedings which might be initiated against him would be statute barred.

State party's information

4.1 In its submission under rule 91 of the rules of procedure, dated 13 May 1997, the State party informs the Committee that the author of the communication submitted the same complaint to the Inter-American Commission on Human Rights, on 1 April 1996 and that his case is registered under No. 11611. The State party consequently requests that the Committee declare this communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the matter is currently being examined by another instance of international investigation.

4.2 No comments have been received from the author in respect to the State party's submission which was transmitted to him on 15 September 1997 and reiterated on 16 December 1997.[23]

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[23] The Inter-American secretariat has informed the Human Rights Committee's secretariat that the case is in fact pending before them, and that the author has been released.

Issues and proceedings before the Committee

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has verified that the same matter is being examined by the Inter-American Commission on Human Rights, and consequently notes that it is precluded from considering the communication while it remains pending before the other international procedure.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol;

(b) That, since this decision may be reviewed under rule 92, paragraph 2, of the Committee's rules of procedure upon receipt of a written request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply, the author may request the Committee to review the present decision;

(c) That this decision shall be transmitted to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

L. Communication No. 740/1997, Barzana v. Chile (Decision adopted on 23 July 1999, sixty-sixth session)*

Submitted by:	Vicente Barzana Yutronic
Alleged victim:	The author
State party:	Chile
Date of communication:	28 July 1996
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 14 February 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Vicente Barzana Yutronic. He submits the communication on his own behalf and on that of his sons Vicente Javier and Alvaro Rodrigo Barzana Alvarez all Chilean/Croatian citizens. It is submitted that they are victims of violations by Chile of articles 2, 4, 5, 6, 7, 9, 10, 14, 17. In respect of all three and also of article 26 in respect of Mr. Vicente Barzana Yutronic, of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author's communication appears to have two main complaints, one based on the alleged harassment suffered by his family, in particular his two sons, allegedly because of Mr. Barzana's human rights activities and his Croatian origin. The second complaint is based on the decision of the Court of Appeal, of 1994, discontinuing the proceedings of investigations related to events which had occurred in 1973.

2.2 Between 17 and 20 September 1973, Mr. Barzana Yutronic was held in detention in Chile. His house was illegally searched and he was subjected to torture, during the events known as "Cora Quillota 2" which had taken place in Villa Alemana and Quillota, Province of Valparaíso.

2.3 On 8 February 1993, proceedings to ascertain the circumstances of Mr. Barzana Yutronic's detention and alleged torture were initiated before the 3rd Criminal

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case.

Court of Santiago (Tercer Juzgado Criminal de Santiago). The proceedings were temporarily discontinued (sobreseimiento temporal), on 27 May 1994.

2.4 On 31 May 1994, the case was remitted to the Santiago Court of Appeal (Ilustre Corte de Santiago de Apelación), which on 28 June 1994, confirmed the discontinuance (sobreseimiento temporal)decreed by the 3rd Criminal Court of Santiago (Tercer Juzgado Criminal de Santiago)in the case. The author alleges that these proceedings were discontinued in application of the amnesty decree of 1978, which he claims violate human rights. Furthermore, he claims that the authorities did not investigate diligently since high ranking military officers, including General Manuel Contreras had been involved in the events.

2.5 The author states that his involvement in the investigation of the events referred to above have caused problems both for himself and his family. In this respect, the author refers to an incident, in May of 1994, which occurred outside of his home where members of the police force (carabineros)held up his two sons, fired at them and arbitrarily arrested them for several hours. They were then released with no charges. They had been accused of stealing a car and carrying weapons. The author alleges that these events were provoked by the carabineros, allegedly because of his human rights activities. He filed a Recurso de Amparo[24] on behalf of his sons which was dismissed and it is this judicial decision that forms the basis of the author's second complaint.

2.6 The author initiated proceedings, before the 13th Criminal Court of Santiago, against the police (carabineros) who had arrested his sons. These proceedings were dismissed (sobreseimiento total y temporal), on 21 September 1995, by the "2nd Military Court of Santiago. He claims that he was never notified that the proceedings had been transferred to a military court. Further, the author states that this decision of the military court is final and can not be appealed.

The complaint

3.1 The author alleges a violation of his and his family's right to a fair and impartial hearing; as their cases were placed before the military courts, therefore the principle of equality of arms was not respected.

3.2 The author further alleges that the amnesty law of 1978 deprived him of the right to justice, including the right to a fair trial and to adequate compensation for violations of the Covenant.

3.3 Mr. Barzana claims that he and his family have received death threats because of his Human Rights activities.

3.4 The author claims that his sons have been arbitrarily detained and tortured during the incident which occurred outside the family home in May of 1994.

3.5 The author further alleges that the persecution he is subjected to is also due to his foreign origin as he and his family have dual nationality Chilean/Croatian. He claims that the Chilean authorities are xenophobic.

3.6 He contends that available domestic remedies have exhausted.

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[24] Secretariat note: It would appear that the author's intention with the Recurso de Amparo was to criminally prosecute those responsible for the arbitrary arrest of his sons.

State party's observations and author's comments thereon

4.1 By submission of 28 August 1997, the State party argues that the communication is inadmissible. It contends that the author has provided no basis for the claim that his sons were illegally arrested and were victims of torture within the meaning of the Covenant.

4.2 The State party argues that the communication should be declared inadmissible under article 1 of the Covenant. They claim that the author has no standing in this case since the alleged victims, Mr. Barzana's sons are both over 18 years old and perfectly able to submitted a complaint on their own behalf.

4.3 The State party further argues that the communication should be ruled inadmissible as having no claim under article 3, of the Optional Protocol on the grounds that the alleged victims were legally detained and released within a few hours once the authorities had verified that there was no reason to hold them.

4.4 With respect to the author's contention that the authorities should revoke the decision of the Courts with respect to the findings of events which occurred in 1973, the State party, points out that the Courts in Chile are independent and that the Government has no authority to revoke decisions handed down by the judicial authorities.

5. In a letter dated 3 January 1998, the author reiterated his claims of victimization, ill-treatment and discrimination in Chile. He claims to have express authorization from one of his sons Vicente Javier Barzana Alvarez,[25] to represent him before the Committee.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes the State party's contention that the communication should be declared inadmissible ratione personae. In this respect, it notes that the author has submitted the communication on behalf of his sons both of whom could have submitted the communication themselves and that there is nothing in the material before the Committee in respect to the claims brought on behalf of his sons to show that the sons have authorized their father to represent them. The Committee considers that the author has no standing before the Committee and consequently, declares this part of the communication inadmissible under article 1 of the Optional Protocol.

6.3 The author's claim in respect of the alleged persecution he is subjected to by the Chilean authorities, due to his Croatian origin, remains a blanket allegation with no further substantiation. Consequently, the Committee considers the claim inadmissible under article 2 of the Optional Protocol.

6.4 With respect to the claim that he author has been denied access to court, in violation of articles 14 of the Covenant, since the events known as "Cora Quillota 2" were investigated by the military courts, the author has provided no further substantiation. In the circumstances of the Committee considers that the author has not substantiated a claim under article 2 of the Optional Protocol.

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[25] There is no indication in the file that such an authorization has ever been received.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 1 and 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 741/1997, Cziklin v. Canada (Decision adopted on 27 July 1999, sixty-sixth session)*

Submitted by:	Michael Cziklin
Alleged victim:	The author
State party:	Canada
Date of communication:	17 April 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Michael Cziklin, a Canadian citizen. He claims to be a victim of a violation by Canada of article 26 of the Covenant.

The facts as submitted by the author

2.1 The author was employed as a trainman by Canadian Pacific Rail (CPR), a private railway corporation, from 1974 to 1976 and again on probationary employment from 1 November 1979 to 2 January 1980, when his employment was terminated on the ground that he had back and knee injuries and therefore did not meet the physical requirements.

2.2 Before taking up employment with CPR in 1974, he passed the physical examination without referring to the injuries to his right knee and back, respectively sustained in 1966 and in 1968. Prior to the probationary employment commencing in November 1979, the author was again tested by the CPR Examiner and approved for work as a trainman, after he advised the examiner of his knee injury but not about his back problems. After two weeks of service, the author experienced twitching in his mid-thigh and was sent to a doctor. This doctor noted that the author had a degenerative disk disease and that he could not do any heavy lifting. Subsequently, on 1 December 1979, the author was allowed back to work after two other specialists allegedly had offered opinions that his condition did not represent any danger to his work.

2.3 However, after a superintendent had reviewed the first doctor's report and the author's file, therein finding records of a claim set forward in 1977 by the author to the Worker's Compensation Board regarding the 1968 back injury, the author was taken off the job on 17 December 1979 and was notified that his probationary employment was terminated on 2 January 1980. During the ensuing year, the author requested CPR on several occasions to reconsider its position and to reinstate him as a trainman, invoking, inter alia, a new letter from the first doctor stating that there was nothing in his first report which would suggest that termination of employment was appropriate. CPR, however, maintained its position by stating that it would only consider rehiring the author if CPR's own examiner declared him fully fit.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

2.4 On 21 July 1981, the author filed a complaint with the Canadian Human Rights Commission, alleging discrimination by CPR on the basis of physical handicap, contrary to paragraphs 7 and 10[26] of the Canadian Human Rights Act. On 9 September 1985, the investigator at the Canadian Human Rights Commission submitted his Investigation Report to the Commission, recommending that the complaint be dismissed as, in his opinion, CPR had established a bona fide occupational requirement within the meaning of paragraph 14(a) of the Canadian Human Rights Act. On 18 February 1986, the Commission decided to dismiss the complaint on the same ground. In its letter to the author, the Commission also informed the author that he did have the opportunity to apply for judicial review of its decision by the Federal Court, and suggested that a lawyer be consulted if he chose to seek such review.

2.5 The author did not apply for judicial review to the Federal Court of Appeal before the expiration of the deadline for filing a notice of appeal to the Court, but did file a notice of motion for an extension of time to file an application on 6 June 1986, some three months after the expiration of the deadline. On 26 June 1986, the motion was rejected by a judge of the Federal Court of Appeal.[27]

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[26] These provisions read as follows:

> "7. It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination
>
> "10. It is a discriminatory practice for an employer or an employee organization
> (a) to establish or pursue a policy or practice, or
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination."

[27] With regard to the author's notice of motion for an extension of time to file for judicial review of 6 June 1986, the State party explains that a judge of the Federal Court of Appeal was empowered to entertain such motions and grant an extension of time. An extension would be granted where there was material to satisfy the Court that there was some justification for not having brought the application within the 10-days period, and there was an arguable case for setting aside the order in question. In the author's case, the Federal Court of Appeal dismissed the motion "on the ground that the material on file [did] not disclose any reasonable ground for challenging the validity of the decision that the applicant wishes to attack."

The complaint

3. The author alleges to be a victim of a discrimination on the ground of physical handicap in violation of article 26 of the Covenant because of the termination of his employment by CPR in January 1980. The author claims that the decision of the Canadian Human Rights Commission was flawed as the author's inability to perform the required job duties were not substantiated. In this regard, the author argues that CPR did not avail itself of the option of having the author's medical condition reevaluated by an independent medical body, and that the Commission in its investigation failed to consult with the United Transportation Union or other bodies to verify the author's version of the job requirements. Furthermore, the author claims that it was the practice of CPR at the time to permit other persons who could not perform certain physically demanding tasks to remain employed and to leave such tasks for those able.

State party's observations on admissibility and author's comments thereon

4.1 In its submission of 17 December 1997, the State party argues several grounds of inadmissibility. Firstly, the State party submits that the communication should be held inadmissible because of the undue delay in bringing it before the Committee. The State party notes that the communication relates to factual events that occurred between 1966 and 1980, that the final domestic decision was passed on 26 June 1986 and that the communication only was submitted almost 10 years later, on 17 April 1996.

4.2 The State party adduces two reasons why the delay should lead to inadmissibility. Firstly, it is argued that the delay can create a problem in ascertaining the facts. In the present case, the State party notes that the author makes certain factual allegations about incidents said to have happened in the 1970s which would require verification (e.g. regarding the author's employment with CPR from 1974-1976, his claim to the Workmen's Compensation Board in 1977 and the complete medical report requested by CPR on 17 December 1979)The State party explains that it will not make any detailed submissions on the facts at the admissibility stage, but is concerned that if the communication were to proceed to the merits stage, it would be difficult to establish a satisfactory factual record so long after the events in question. It is submitted that this would prejudice the State party and affect the assessment by the Committee of the merits of the communication. Secondly, the State party argues that although the language of article 26 of the Covenant remains the same as when the events relating to this communication occurred, fundamental developments[28] have taken place both domestically and internationally since then in relation to the equality rights of persons with disabilities which may affect the interpretation and application of article 26 in matters affecting them. In this regard, the State party also mentions that these developments may affect the position the State party would regard as appropriate to put forward in litigation involving persons with disabilities.

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[28] The State party gives several examples: the adoption of the Convention on the Rights of the Child in 1989 as the first international convention expressly to include disability as a prohibited ground of discrimination; Section 15 of the Canadian Charter of Rights and Freedoms of April 1985; the Supreme Court of Canada's judgment in Eaton v. Brant County Board of Education of 1997; Bill S-5, an Act to amend the Canada Evidence Act, the Criminal Code, the Canadian Human Rights Act and other Acts in respect of persons with disabilities.

4.3 The State party argues that, even though the Optional Protocol does not contain an express time limit, a communication can be held inadmissible on the ground of undue delay, either pursuant to article 3 as an abuse of the right of submission, or on the basis of the interpretive powers of the Committee regarding its role under the Optional Protocol. With regard to article 3, the State party argues that when the circumstances are such that the ability of a State party to exonerate itself is prejudiced because of the unreasonable delay of the complaint, the communication ought to be inadmissible as an abuse of the right to submission, given that there was no impediment in making a timely submission to the Human Rights Committee. The State party makes reference to the Committee's finding in Communication No. 72/1980, K. L. v. Denmark, and submits that, as in that case, the fact that the author took domestic actions (see para. 4.6 below) at the same time that he was pursuing his case before the Committee and that he has not adequately substantiated his claims are additional relevant factors when considering this issue.

4.4 As an alternative basis for declaring the communication inadmissible because of undue delay, the State party notes that the Committee on occasion[29] has held that, implicit in its role under the Optional Protocol, is the power of performing certain functions necessary to that role but that are not explicitly conferred on it by the Optional Protocol or the Covenant. The State party submits that such an approach should be taken here, thus enabling the Committee to find unduly delayed communications inadmissible.

4.5 The State party submits that the communication should be held inadmissible also under article 5, paragraph 2(b), of the Optional Protocol for non-exhaustion of domestic remedies. In this regard, the State party argues that a judicial review of the decision of the Canadian Human Rights Commission by the Federal Court of Appeal would have been an effective and available remedy as the Federal Court is empowered to set aside a decision of the Commission where the Federal Court finds that the Commission's decision was based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard of the material before it."[30] There, it is submitted, the author could have argued, as he has argued in the present communication, that the decision of the Commission was flawed because it was not substantiated by the evidence nor based upon sufficient investigation. If the author had been successful in his arguments, the Federal Court would have remitted the matter back to the Commission for further investigation into his allegations of unlawful discrimination. It is submitted that the author failed to avail himself of this domestic remedy by his own inaction, as he did not apply for judicial review in a timely fashion.

4.6 The State party also states that the decision of the Federal Court of 26 June 1986 was a "final or other judgment of the Federal Court of Appeal" within the meaning of section 31(3) of the Federal Court Act which thus could have been appealed to the Supreme Court of Canada. In this regard, the State party explains that on 8 August 1996, ten years after the decisions of the Canadian Human Rights Commission and the Federal Court of Appeal, and after the submission of the present communication, the author wrote to the Federal Court of Appeal requesting an order setting aside the former decisions. On 26 August 1996, the Court dismissed this application on the ground that it had no jurisdiction to hear it. Then on 27 January 1997, the federal Department of Justice received a copy of documents signed by the author dated 21 January 1997 apparently seeking an extension of time to apply for leave to appeal to the Supreme Court of Canada from the denial of the Federal Court of Appeal of an extension of time to apply for judicial review of the decision of the Canadian Human Rights Commission in 1986. The State Party states that these documents have not, however, been officially served on the Attorney General of Canada, nor have they been registered in the Supreme Court of Canada.

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[29] As an example, the State party mentions that the majority of the Committee members in a general debate in 1983 concluded that the Committee might on an exceptional basis reconsider its views on the merits, although there were no express provisions to this effect in the Optional Protocol. (Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), paras. 391-396.)

[30] Federal Court Act, R.S.C. 1970, section 28(1)(c).

4.7 The State party also submits that the communication is inadmissible under article 1 of the Optional Protocol because it does not allege a violation of the Covenant by Canada, but rather appears to be directed against the conduct of a private entity, Canadian Pacific Railways, as the author alleges that he was the victim of discrimination on the ground of disability by this private corporation, the capital stock of which is owned by private parties. The State party states that CPR is not a part or agent of the Government of Canada or of any other components of the Canadian State, such as a provincial or territorial government, and submits that the actions of CPR cannot be attributed to Canada or engage the responsibility of the Government of Canada under the Covenant.

4.8 If, in the alternative, the author regards his complaint as against the Canadian Human Rights Commission for what he describes as its "flawed" decision in his case, then the State party submits that a disagreement with the decision of a domestic tribunal in a private dispute is not sufficient to engage the jurisdiction of the Human Rights Committee. In this regard, the State party notes that the author has not alleged a violation of his rights under article 14 of the Covenant by the Canadian Human Rights Commission, nor adduced facts that would suggest such a violation.

4.9 Finally, the State party submits that the author's claim of a violation of article 26 of the Covenant should be held inadmissible under article 2 of the Optional Protocol for lack of substantiation. The State party argues that the Investigation Report to the Canadian Human Rights Commission gives a detailed statement of the facts and concludes that because of his knee and back problems the author had a physical handicap which gave rise to a safety hazard in his probationary employment as a trainman, and that it was not feasible to make reasonable accommodation for his handicap. On this basis, the investigator concluded that a *bona fide occupational requirement* had been established within the meaning of section 14(a) of the Canadian Human Rights Act. After reviewing the report, the Canadian Human Rights Commission reached the same conclusion. Assuming that these conclusion were accurate, the State party submits that a *prima facie* violation of article 26 has not been disclosed.

5. In his comments on the State party's submission, the author argues that the State party failed to mention new and compelling evidence which came to light in 1997 and 1998, evidence which should have been available to the Canadian Human Rights Commission during the period of investigation, i.e. 1981-86. The author implies that the evidence in question, three statements from the United Transportation Union, one statement from the former investigator of the Canadian Human Rights Commission and records from the Workers' Compensation Board, shows that other individuals suffering similar injuries were accommodated for with knee or back braces and/or were allowed to work with imposed restrictions. The author submits that this clearly establishes a violation of sections 7 and 10 of the Human Rights Act.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The author has alleged to be a victim of a violation of article 26 of the Covenant on what appears to be two different grounds; 1) that CPR could have provided reasonable accommodation for his physical injuries and that the lack of such accommodation constitutes discrimination on the ground of physical handicap, and 2) that the Canadian Human Rights Commission, mistakenly, considered him to suffer a physical condition which justified CPR's decision to dismiss as a trainman.

6.3 The Committee notes, however, as explained by the State party, that the author has not taken the necessary steps to appeal the Federal Court of Appeal's decision of 26 June 1986 to the Supreme Court of Canada. The Committee finds that this was an available and effective remedy and that the communication therefore is inadmissible under article 5, paragraph 2(b), of the Optional Protocol, for non-exhaustion of domestic remedies. Consequently, the Committee need not address the other arguments set forth by the State party against the admissibility of the communication.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

N. Communication No. 742/1997, Byrne and Lazarescu v. Canada (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by: Pamela R. M. Byrne and
Linda E. Lazarescu

Alleged victims: The authors

State party: Canada

Date of communication: 23 April 1996

Prior decisions: Special Rapporteur's rule 91 decision, transmitted to the State party on 24 April 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Pamela Rachelle Mary Byrne and Linda Ellen Lazarescu. They claim that they and their children are victims of a violation by Canada of articles 23, 24 and 26 of the Covenant.

The facts as submitted by the authors

2.1 Mary Byrne separated from her husband in 1986 and the Court ordered her husband to pay two thirds of the child's living expenses, and set the amount at $ 575.00 per month in child support. The author states that she pays $ 190.00 per month in income tax over this amount, pursuant to paragraph 56(1)(b) of the Income Tax Act. Her husband, on the other hand, enjoys a tax deduction for child support payments, amounting to an *Income Tax Refund of $ 3,420.00 a year, pursuant to* paragraph 60(b) of the Income Tax Act. Thus, in practice, the author now pays $ 490.00 of the child's monthly costs of living, whereas her ex-husband in reality pays only $ 290.00 per month, the reverse of what was intended by the Court's decision. She further states that following an accident in 1989 her husband receives $ 2,800.00 per month in non-taxable insurance payments.

2.2 Linda Lazarescu separated from her husband in 1983, and the Court ordered her husband to pay about half of the child's maintenance costs. His share was set at $ 300.00 per month. The author explains that in 1991, she received $ 3,775.00 in child support from her ex-husband. Over this amount, she paid $ 1,245.75 of taxes. On the other hand, her ex-husband receives a tax refund over the child benefits he pays of about $ 1,585.50. Putting the actual costs for the child at $ 9,037.00 a year, she concludes that she pays in reality $ 7.437.75 towards maintenance of the child, far more than the 50 per cent the judge intended to have her pay.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure

2.3 The authors appealed to the Tax Court in 1993, against the inclusion of child support as taxable income. On 18 March 1994, the judge reserved judgment, awaiting the outcome of a similar case at the Federal Court, submitted by Suzanne Thibaudeau. In May 1994, the Federal Court of Appeal found in favour of Thibaudeau, judging that paragraph 56(1)(b) violated the right to equality. On 3 June 1994, the Tax Court found in favour of the authors and ruled that paragraph 56(1)(b) of the Income Tax Act violated their rights under the Canadian Charter of Rights and Freedoms. Subsequently, the authors were informed that their cases were being appealed to the Federal Court of Appeal.

2.4 In the meantime, the Government appealed the judgment in the case of Thibaudeau to the Supreme Court. On 25 May 1995, the Supreme Court decided by majority decision that paragraph 56(1)(b) did not infringe on the equality rights guaranteed by Section 15 of the Charter. On 25 March 1996, the Federal Court, bound by the Supreme Court's decision in Thibaudeau, found against the authors.

2.5 On 18 May 1994, Linda Lazarescu had filed a complaint with the Canadian Human Rights Commission. On 15 September 1995, the Human Rights Commission informed her that, considering all the circumstances, no further proceedings were warranted.

2.6 The authors state that on 6 March 1996, the Minister of Finance, in his annual Budget Speech, promised to change the tax system concerning child support contributions.

The complaint

3. The authors claim that they are discriminated against because of their status as custodial mothers, in violation of articles 23, paragraph 4, and 26 of the Covenant. They further claim that the present Income Tax Act fails to protect the child, by reducing the actual amount of child support paid by the non-custodial parent, thereby putting the child at an economic disadvantage and creating financial insecurity. *This is said to constitute a violation of articles* 23, paragraph 4, and 24, paragraph 1, of the Covenant.

State party's observations and authors' comments thereon

4.1 By submission of 17 December 1997, the State party argues that the communication is inadmissible, since the authors cannot claim to be victims of a violation of the Covenant, since they have failed to exhaust domestic remedies and since they have failed to substantiate their claim.

4.2 The State party explains that one of the principles of the Canadian income tax system is that a taxpayer's taxable income is determined by adding together all of his or her sources of income. The system is further based on tax equity, meaning that taxpayers in similar economic situations should pay the same amount of tax. From 1942 until 1 May 1997, Canada's tax treatment of child support for separated parents required the parent receiving child support to include the amount received in his or her income and the support paying parent was allowed to claim the amount paid as deduction (the so-called inclusion-deduction system). According to the State party this tax regime met the requirements of tax equity by ensuring that custodial parents who do not receive support and who support their children with equivalent income drawn from other sources.

4.3 The State party submits that this system also sought to increase the available resources that could be used for the benefit of the children by 'income-splitting', transferring income to a member of the family so that the income may be taxed in the hands of the other at a lower rate. According to the State party, this transfer resulted in a net tax savings for the couple where the recipient parent was subject to a lower marginal tax rate. The majority of custodial parents are said to have benefited from this. Pursuant to provincial family law, lawyers and judges were supposed to consider the tax consequences (by "grossing-up" the amount to account for the tax consequences) when determining the level of child support awarded. The State party acknowledges, however, that parents, lawyers and judges have not always fully or accurately accounted for the tax consequences in determining child support amounts.

4.4 The State party explains that child support paid under orders or agreements made on or after 1 May 1997, is no longer taxed as income to the recipient or tax deductible for the payer. For those orders made prior to 1 May 1997, parents may consent to the application of the new rules. If mutual consent cannot be obtained, then either party may apply to a court to vary their order or agreement so that the new rules apply. In this connection, the State party submits that it would have been manifestly unfair to have retroactively applied the new tax rules to existing child support arrangements.

4.5 The State party argues that the issue raised by the communication is moot since the tax system has changed and the authors may apply for the new rules to be applied to them. The State party points out that this change was announced before the authors submitted their communication to the Committee. According to the State party, any alleged inconsistency with the Covenant has been corrected and the authors are no victims of a violation of a right under the Covenant. In this connection, the State party refers to the Committee's decisions in communications Nos. 478/1991[31] and 501/1992.[32]

4.6 In so far the authors argue that despite the change in law, they should be entitled to compensation for the allegedly discriminatory scheme, the State party argues that there is no automatic right to compensation under the Covenant and that the measures taken by the Government have provided a sufficient remedy to the authors. In this context, the State party notes also that under Canadian constitutional law, if legislation is found to be contrary to the Charter, the appropriate remedy is to declare the provision(s) of no force, but as a general rule, damages or compensation are not awarded.

4.7 The State party notes that the facts as submitted by the authors reveal a concern about the adequacy of child support awarded to them in the light of the tax consequences. The State party submits that under Canadian family law, if a custodial parent feels that the amount of child support originally granted by a court is no longer sufficient, he or she may apply to a court for a variance of the child support amount. The State party notes that the authors have sought such variances in the past, but failed to do so in respect of the present claim. Accordingly, the State party argues that the authors have failed to exhaust all domestic remedies available to them.

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[31] A.P.L. v.d.M. v. the Netherlands, declared inadmissible on 26 July 1993.

4.8 The State party further argues that the authors have not sufficiently substantiated their claim by showing a prima facie case that the former tax system violated article 26 of the Covenant. In this connection, the State party refers to the Committee's standard jurisprudence that a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. The State party also refers to the Committee's decision in communication No. 129/1982,[33] where the Committee held that the assessment of taxable income is not in itself a matter covered by the Covenant and where there is no evidence substantiating a claim of discrimination with respect to such assessment, the communication is incompatible with the provisions of the Covenant and inadmissible.

4.9 The State party also refers to the Committee's jurisprudence that unfavourable results in the application of general rules do not constitute discrimination. In this context, the State party argues that in the area of financial and social benefit legislation distinctions are often necessary and desirable to achieve a just and proper distribution of State revenue, as recognised by the Committee in the past.

4.10 The State party denies the authors' statement that it has indirectly admitted violating their rights by making changes to the Income Tax Act. It states that the changes were made for policy reasons, and a decision to amend a law does not imply that the law was necessarily incompatible with the Covenant.

4.11 According to the State party, the authors have not substantiated how the inclusion/deduction scheme violates article 26. To the extent that the scheme differentiated between custodial and non-custodial parents, the State party submits that such differentiation was reasonable and justified. In this context, it explains that the intent of the scheme was to achieve tax savings for separated and divorced couples by having the child support amount taxed in the hands of the recipient, who was generally in a lower tax bracket. The income splitting sought to lessen the economic consequences of marital breakdown and to free up more resources for children, as recognised by the majority of the Supreme Court of Canada. Moreover, by permitting a deduction for the child support payer, the payer was encouraged to make the payments and had greater resources to do so.

4.12 The State party acknowledges that in Canada the vast majority of custodial parents are women and that there are significant problems in ensuring that the non-custodial parents live up to their child support obligations. The State party also acknowledges that there are serious financial consequences due to marital breakdown and that judges and lawyers do not always determine adequate amounts for child support. However significant these problems may be, their root causes do not lie with the tax treatment of child support, according to the State party.

4.13 With regard to the authors' argument that they are paying a disproportionate share of the costs associated with raising their children, the State party notes that this result likely has more to do with inflationary costs and changes in the financial circumstances of their former spouses than with the tax treatment of child support. The State party reiterates that where a parent feels that she is paying an unfair share of child support, she may apply to court to have the child support award varied to achieve a fairer result. The State party concludes that the application of the Income Tax Act to the authors' cases does not amount to a violation of article 26 of the Covenant. If the inclusion/deduction system created a difference in treatment, this differentiation is said to have been based on reasonable and objective criteria.

4.14 The State party submits that the authors have not in any way substantiated their claim under articles 23 and 24 of the Covenant.

5.1 In reply to the State party's submission, the authors maintain that their communication is admissible. They state that they have given the State party every opportunity to correct the injustice of the taxation of child support. The new legislation does not address the past injustice to custodial mothers, since if they want to change the terms of the support agreement, they would have to return to Court, at substantial cost. They maintain therefore that they are victims of violations by the State party.

5.2 Further, they submit that they have exhausted all domestic remedies. They state that they are not willing to enter into new arrangements with their ex-husbands for the sole purpose of a variance for taxation. In this context, they argue that the money which is given by their ex-husbands is for the support of their children and should therefore not count as taxable income. Moreover, they submit that a variance at this time would lower the support payments substantially, in accordance with the new Child Support Guidelines developed by the State party under the new law. They further argue that they can ill afford the legal fees associated with a court action.

5.3 Ms. Lazarescu states that her son is now living on his own, and that she no longer receives child support payments.

5.4 The authors conclude that the State party has admitted the discrimination under the old law by changing it.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the authors claim that the tax system applied to them, which taxes child support payments as income, is discriminatory, since it results in them paying more towards the costs of raising the children than their former spouses. The State party on the other hand, has argued that the system is not discriminatory and aims at making more money available for child support payments. Be this as it may, the law in question has been amended by the State party and the tax system at issue in this communication has been removed for maintenance agreements as of 1 May 1997, whereas custodial parents who receive child support payments as a result of an agreement of before that date, can apply to the Court for a variance of the agreement in accordance with the new tax system. The authors have declined to make use of this opportunity because of the costs involved and also because of their estimation that the child support payments under the new system would amount to less than what they hitherto received.

6.3 The Committee notes that the authors' main grievance is that as a result of taxation they have paid more towards the maintenance of the child than their former spouses. The Committee observes that the proportional contributions of parents in paying child maintenance are set by the Family Court, not by the tax authorities. In the opinion of the Committee the alleged unequal payments in the authors' cases were the result of the interaction between the child support order providing for the payments and the application of the Income Tax Act. This is to be taken into account by the Court in determining the level of payments. It is not for the Committee to reevaluate the determination of payments by the domestic Courts. In this context, the Committee notes that if the Court did not take the tax consequences into account, as has been suggested by the authors, the authors could have applied for a variance of the order on this basis.

6.4 The Committee concludes that the facts submitted by the authors do not substantiate their claim that they have been a victim of a violation of article 26, nor of articles 23 and 24 of the Covenant.

7. Accordingly, the Committee decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the authors.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued in Arabic, Chinese and Russian as part of the present report.]

O. Communication No. 744/1997, Linderholm v. Croatia (Decision adopted on 23 July 1999, sixty-sixth session)*

Submitted by: Dagmar Urbanetz Linderholm

Alleged victim: The author

State party: Croatia

Date of communication: 20 May 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 23 July 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mrs. Dagmar Urbanetz Linderholm. The author, who lives in London, England, claims to be a victim of violations by Croatia of articles 26 and 14, paragraph 1, of the Covenant. She states that her parents' hotel was expropriated in 1945 and 1948, and that, following the enactment of a transformation law in 1991, irregularities occurred in the determination of her rights to restitution.

2. The communication was transmitted to the State party on 27 February 1997. The State party's observations concerning the admissibility of the communication were received on 28 April 1997, and the author's comments thereon in July 1997.

3. In March 1998, the author introduced an application concerning the same facts and issues to the European Commission of Human Rights. On 29 May 1998, her application was registered under file No. 41399/98. On 22 October 1998, the European Commission declared the communication inadmissible as it found that it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the European Commission of Human Rights has rejected, on 22 October 1998, the author's application concerning the same facts and issues as are before the Committee. Although the scope of article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is different from article 26 of the Covenant, property rights are protected by the European Convention and no separate issue therefore arises under article 26 of the Covenant. The Committee further notes that the Republic of Croatia, when acceding to the Optional Protocol, made a declaration with respect to article 5, paragraph 2(a), of the Optional Protocol to the effect that the Committee shall not have competence to consider a communication from an individual if the same matter is being examined or has already been examined under another procedure of international investigation or settlement. On this basis, the Committee is therefore precluded from considering the present communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Martin Scheinin, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

5. The Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2(a), of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 746/1997, Menanteau v. Chile (Decision adopted on 26 July 1999, sixty-sixth session)*

Submitted by:	Humberto Menanteau Aceituno and José Carrasco Vasquez (represented by counsel Mr. Nelson Caucoto Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas)
Alleged victim:	The authors
State party:	Chile
Date of communication:	21 August 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 1999,

Adopts the following:

Decision on admissibility

1. It is alleged that Mr. Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez, are victims of violations by Chile of articles 2, 5, 14 paragraph 1, 15 paragraphs 1 and 2, 16 and 26 of the International Covenant on Civil and Political Rights. They are represented by counsel, Mr. Nelson Caucoto Pereira of the Fundación de Ayuda Social de las Iglesias Cristianas. The Covenant entered into force for Chile on 23 March 1976, the Optional Protocol on 28 August 1992.[34]

The facts as submitted by the author

2.1 On 19 November 1975, Humberto Menanteau was detained at his parents' house. The day after Jose Carrasco was detained at a friend's house. It is believed they were both killed on 1 December of the same year. Their relatives recognised their bodies on 10 December 1975 at the morgue. The bodies which were found by a farmer, were mutilated and presented signs of torture.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Cecilia Medina Quiroga did not participate in the examination of the case.

[34] Chile entered a declaration, recognizing the competence of the Human Rights Committee to receive and consider communications from individuals, on the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol, or in any event to acts which began after 11 March 1990.

2.2 Humberto Menanteau and Jose Carrasco were members of the armed group MIR (Movimiento de Izquierda Revolucionario) when at the end of 1974 they were detained by the police, the then DINA (Dirección de Inteligencia Nacional). While detained, both men and two other members of the MIR, took part in a televised meeting in which they tried to convince the rest of the armed group to put an end to the armed conflict. They were released in September of 1975.

2.3 They were re-detained in November 1975, by armed civilians whom the Chilean Authorities alleged were members of the MIR. During their prior detention, the press had published that the MIR had threatened the lives of those that had called for an end to the armed conflict. Moreover, after the deaths of Humberto Menanteau and Jose Carrasco, their relatives received letters in which the MIR allegedly assumed responsibility for their deaths.

2.4 Counsel states that DINA members were responsible for these murders, allegedly to prevent both men from rejoining the MIR. Counsel also points out that there were witnesses who saw both men at the DINA's headquarters, Villa Grimaldi, during their second detention, in November 1975.

2.5 Proceedings to ascertain the circumstances of the deaths of Humberto Menanteau and Jose Carrasco were initiated, on 2 December 1975, before the Buin Maipo Court (Juzgado de Letras de Buin-Maipo)The Buin Maipo Court decreed on 6 October 1976, a provisional discontinuance (sobreseimiento provisional) of the case.

2.6 In 1991 the case was reopened both on the basis of new information and a new witness. The witness, Luz Arce Sandoval, had been detained by the DINA which she had later joined. She identified the DINA members who had allegedly taken part in the kidnappings and murders. While the civil courts were investigating the case, the military jurisdiction initiated a conflict of jurisdiction which was resolved by the Supreme Court, on 23 March 1993,in favour of the Military Jurisdiction. The II Military Court of Santiago (II Juzgado Militar de Santiago) decreed the formal discontinuance (sobreseimiento definitivo) of the case, in accordance with law 2.191 of 1978, without going into further investigations. On 14 December 1994 the Military Court (Corte Marcial)[35] ratified this decision.

2.7 A complaint (Recurso de Queja) was then filed with the Supreme Court (Corte Suprema), on grounds of abuse of power on the part of the II Military Court of Santiago and the Military Court, for dismissing a case under the provisions of the Amnesty decree of 1978. On 16 May 1996, the Supreme Court dismissed the complaint. Two of the civilian judges concurred with the decision, but stated that the case should have been dismissed because the criminal action was statute-barred and not on the basis of an amnesty.

The complaint

3.1 The complaint is based on violations by the Chilean authorities both of national law and international conventions. Counsel alleges that the events narrated constitute acts or omissions which, when committed, were criminal acts under general principles of law recognised by the community of nations, and which may not be statute-barred nor unilaterally pardoned by a State, and are in violation of article 15, paragraph 2, of the Covenant. Counsel claims that by applying the amnesty law of 1978 Chile accepted the impunity of those held responsible for these acts. It is alleged that the State has renounced its obligation to investigate international crimes and to bring to justice those responsible for the crimes. This means that fundamental rights of the victims and their families have been violated.

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[35] Counsel explains that this Court is made up of five judges; three are officers, one each from the army, the air force and the Carabineros, the other two are civil judges from the I Santiago Court of Appeal.

3.2 Counsel alleges that application of the 1978 amnesty law, decree no 2191, deprived the victims and their families of the right to justice including the right to a fair trial and to adequate compensation for the violations of the Covenant.[36] Counsel further alleges a violation of article 14 of the Covenant, in that neither the authors nor their families were afforded the right to a fair and an impartial hearing: as the case was placed before the military courts, the principle of equality of arms was not respected.

3.3 The decisions of the military courts not to investigate the victims' deaths are said to constitute a violation of the latters' right to be recognized as a person before the law, in violation of article 16 of the Covenant.

3.4 Counsel contends that with the Supreme Court's judgement of May 1996, all available domestic remedies have been exhausted.

3.5 With respect to the reservation entered by Chile upon ratification of the Optional Protocol, it is alleged that although the events occurred prior to 11 March 1990, the contested decision is the Supreme Court's judgement of May 1996.

State party's observations and counsel's comments

4.1 In submission dated 26 August 1997, the State party provides a detailed account of the history of the case and of the amnesty law of 1978. It specifically concedes that the facts did occur as described by the authors. It was indeed in reaction to the serious human rights violations committed by the former military regime that former President Aylwin instituted the National Truth and Reconciliation Commission by Decree of 25 April 1990. For its report, the Commission had to set out a complete record of the human rights violations that had been brought to its attention; among these were the authors' case. The State party gives a detailed account of investigations into the incident. It is noted that the case is set out in page 534 of the Commission's final report; the conclusion was that the deaths did not occur as reflected in the official version published at the time but rather were the responsibility of the DINA.

4.2 The State party submits that the facts at the basis of the communication cannot be attributed to the constitutionally elected government(s) which succeeded the military regime. It provides a detailed account of the historical context in which large numbers of Chilean citizens disappeared and were summarily and extrajudicially executed during the period of the military regime.

4.3 The State party notes that it is not possible to abrogate the Amnesty Decree of 1978, and adduces reasons: first, legislative initiatives such as those relating to amnesties can only be initiated in the Senate (article 62 of the Constitution), where the Government is in a minority. Second, abrogation of the law would not necessarily have repercussions under criminal law for possible culprits, on account of the prohibition of retroactive application of criminal laws. This principle is enshrined in article 19 lit.3 of the Chilean Constitution and article 15, paragraph 1, of the Covenant. Three, the composition of the Constitutional Court. Four, the designation of the Commanders in Chief of the Armed Forces; the President of the Republic may not remove the present officers, including General Pinochet. Lastly the composition and attributions of the National Security Council (Consejo de Seguridad Nacional) restrict the attributions of the democratic authorities in all matters pertaining to internal or external national security.

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[36] In this respect, reference is made to the Inter-American Commission's decision in the Velazquez Rodriquez case.

4.4 The State party further observes that the existence of the amnesty law does not inhibit the continuation of criminal investigations already under way in Chilean tribunals. In this sense, the amnesty decree of 1978 may extinguish the criminal responsibility of those accused of crimes under the military regime, but it cannot in any way suspend the continuation of investigations that seek to establish what happened to individuals who were detained and later disappeared. This has been the interpretation of the decree both by the Military Court and by the Supreme Court.

4.5 The Government emphasizes that the Chilean Constitution (article 73) protects the independence of the judiciary. As such, the Executive cannot interfere with the application and the interpretation of domestic laws by the courts, even if the courts' decisions go against the interests of the Government.

4.6 With respect to the terms of the amnesty law, the State party points to the necessity to reconcile the desire for national reconciliation and pacification of society with the need to ascertain the truth of past human rights violations and to seek justice. These criteria inspired ex-President Aylwin when he set up the Truth and Reconciliation Commission. To the State party, the composition of the Commission was a model in representativity, as it included members associated with the former military regime, former judges and members of civil society, including the founder and president of the Chilean Human Rights Commission.

4.7 The State party distinguishes between an amnesty granted de facto by an authoritarian regime, by virtue of its failure to denounce or investigate massive human rights abuses or by adopting measures designed to ensure the impunity of its members, and an amnesty adopted by a constitutionally elected democratic regime. It is submitted that the constitutionally elected governments of Chile have not adopted any amnesty measures or decrees which could be considered incompatible with the provisions of the Covenant; nor have they committed any acts which would be incompatible with Chile's obligations under the Covenant.

4.8 The State party recalls that after the end of the mandate of the Truth and Reconciliation Commission, another body - the so-called "*Corporación Nacional de la Verdad y Reconciliación*" - continued the work of the former, thereby underlining the Government's desire to investigate the massive violations of the former military regime. The "Corporación Nacional" presented a detailed report to the Government in August of 1996, in which it added the cases of 899 further victims of the previous regime. This body also oversees the implementation of a policy of compensation for victims which had been recommended by the Truth and Reconciliation Commission.

4.9 The legal basis for the compensation of victims to the former military regime is Law No.19.123 of 8 February 1992, which

* sets up the Corporación Nacional and mandates it to promote the compensation to the victims of human rights violations, as identified in the final report of the Truth and Reconciliation Commission;

* mandates the Corporación Nacional to continue investigations into situations and cases in respect of which the Truth and Reconciliation Commission could not determine whether they were the result of political violence;

* fixes maximum levels for the award of compensation pensions in every case, depending on the number of beneficiaries;

* establishes that the compensation pensions are readjustable, much like the general system of pensions;

* grants a "compensation bonus" equivalent to 12 monthly compensation pension payments;

* increases the pensions by the amount of monthly health insurance costs, so that all health-related expenditures will be borne by the State;

* decrees that the education of children of victims of the former regime will be borne by the State, including university education;

* lays down that the children of victims of the former regime may request to be exempted from military service.

In accordance with the above guidelines, the relatives of both Mr. Menanteau and Mr. Vásquez have received and are currently receiving monthly pension payments.

4.10 In the light of the above, the State party requests the Committee to find that it cannot be held responsible for the acts which are at the basis of the present communications. It solicits, moreover, a finding that the creation of the National Truth and Reconciliation Commission and the corrective measures provided for in Law No.19.123 constitute appropriate remedies within the meaning of articles 2 and 3 of the Covenant.

4.11 The State party reaffirms that the real obstacle to the conclusion of investigations into disappearances and summary executions such as in the authors' cases remains the amnesty decree of 1978 adopted by the former military government. The current Government cannot be held responsible internationally for the serious human rights violations which are at the basis of the present complaints. Everything possible to ensure that the truth be established, that justice be done and that compensation be awarded to the victims or their relatives has been undertaken by the present Government, as noted in the submission. The desire of the Government to promote respect for human rights is reflected in the ratification of several international human rights instruments since 1990, as well as the withdrawal of reservations to some international and regional human rights instruments which had been made by the military regime.

4.12 The State party further recalls that with the transition to democracy, the victims of the former regime have been able to count on the full cooperation of the *authorities, with a view to recovering, within the limits of the* law and the circumstances, their dignity and their rights. Reference is made to the ongoing work of the Corporación Nacional de Reparación y Reconciliación.

5.1 In his comments, counsel takes issue with several of the State party's observations. He contends that the State party's defence ignores or at the very least misconstrues Chile's obligations under international law, which are said to mandate the Government to take measures to mitigate or eliminate the effects of the amnesty decree of 1978. Article 2 of the American Convention on Human Rights and article 2, paragraph 2, of the Covenant impose a duty on the State party to take the necessary measures (by legislation, administrative or judicial action)to give effect to the rights enshrined in these instruments. To counsel, it is wrong to argue that there is no other way than to abrogate or declare null and void the 1978 amnesty decree: nothing prevents the State party from amnestying those who committed wrongs, except where the wrongs committed constitute international crimes or crimes against humanity. For counsel, the facts at the basis of the present communications fall into the latter category.

5.2 To counsel, it is equally wrong to argue that the principle of non-retroactivity of criminal laws operates against the possibility of prosecuting those deemed responsible for grave violations of human rights under the former military regime. This principle does not apply to crimes against humanity, which cannot be statute-barred. Moreover, if the application of the principle of non-retroactivity of criminal legislation operates in favour of the perpetrator but collides with other fundamental rights of the victims, such as the right to a remedy, the conflict must be solved in favour of the latter, as it derives from violations of fundamental rights, such as the right to life, to liberty or physical integrity. In other words, the perpetrator of serious crimes cannot be deemed to benefit from more rights than the victims of these crimes.

5.3 Counsel further claims that from a strictly legal point of view, the State party has, with the modification of Chile's Constitution in 1989 and with the incorporation into the domestic legal order of international and regional human rights instruments such as the American Convention on Human Rights and the Covenant, implicitly abrogated all (domestic) norms incompatible with these instruments; this would include the Amnesty Decree D.L.2.191 of 1978.

5.4 In respect of the State party's argument relating to the independence of the judiciary, counsel concedes that the application of the amnesty decree and consequently the denial of appropriate remedies to the victims of the former military regime derives from acts of Chilean tribunals, in particular the military jurisdictions and the Supreme Court. However, while these organs are independent, they remain agents of the State, and their acts must therefore engage State responsibility if they are incompatible with the State party's obligations under international law. Counsel therefore considers unacceptable the State party's argument that it cannot interfere with the acts of the judiciary: no political system can justify the violation of fundamental rights by one of the branches of Government, and it would be absurd to conclude that while the executive branch of government seeks to promote adherence to international human rights standards, the judiciary may act in ways contrary to, or simply ignore, these standards.

5.5 Counsel finally argues that the State party has misleadingly adduced the conclusions of several reports and resolutions of the Inter-American Commission on Human Rights in support of its arguments. To counsel, it is clear that the Commission would hold any form of amnesty which obstructs the determination of the truth and prevents justice from being done, in areas such as enforced and involuntary disappearances and summary executions, as incompatible with and in violation of the American Convention on Human Rights.

5.6 Counsel reiterates his allegations as summarized in paragraphs 3.1 and 3.2 above. What is at issue in the present cases is not the granting of some form of compensation to victims of the former regime, but the denial of justice to them: the State party resigns itself to arguing that it cannot investigate and prosecute the crimes committed by the military regime, thereby foreclosing the possibility of any judicial remedy for the victims. To counsel, there is no better remedy than the determination of the truth, by way of judicial proceedings, and the prosecution of those held responsible for the crimes. In the instant cases, this would imply ascertaining the burial sites of the victims, why they were murdered, who killed them or ordered them to be killed, and thereafter indicting and prosecuting those responsible.

5.7 Counsel adds that his interpretation of the invalidity of Amnesty Decree 2.191 of 1978, in the light of international law and the Covenant, has been endorsed by the Inter-American Commission on Human Rights in a Resolution adopted in March 1997. In this resolution, the Commission held the amnesty law to be contrary to the American Convention on Human Rights, and admonished the State party to amend its legislation accordingly. The Chilean Government was requested to continue investigations into disappearances that occurred under the former regime, and to indict, prosecute and try those held responsible. To counsel, the Commission's resolution perfectly sets out Chile's responsibility for facts and acts such as those at the basis of the present communications.

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party does not explicitly challenge the admissibility of the communication, although it does point out that the events complained of by the authors, including the Amnesty Decree of 1978, occurred prior to the entry into force of the Optional Protocol for Chile, which ratified that instrument on 28 August 1992 with the following declaration: "In ratifying the competence of the Human Rights Committee to receive and consider communications from individuals, it is the understanding of the Government of Chile that this competence applies in respect of acts occurring after the entry into force for that State of the Optional Protocol or, in any event, to acts which began after 11 March 1990".

6.3 The Committee notes that the authors also challenge the judgments of the Supreme Court of Chile of 16 May 1996 denying their request for the revision of earlier adverse decisions rendered on their applications by military courts.

6.4 The Committee notes that the acts giving rise to the claims related to the deaths of the authors occurred prior to the internationl entry into force of the Covenant, on 23 March 1976. Hence, these claims are inadmissible *ratione temporis*. The Supreme Court judgement of 1996 cannot be regarded as a new event that could affect the rights of a person who was killed in 1975. Consequently, the communication is inadmissible under article 1 of the Optional Protocol, and the Committee does not need to examine whether the declaration made by Chile upon accession to the Optional Protocol has to be regarded as a reservation or a mere declaration.

6.5 The question of whether the next of kin of the executed victims might have a valid claim under the Covenant notwithstanding the inadmissibility of the instant communication is not before the Committee and need not be addressed in these proceedings.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party, and to the authors' counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 751/1997, Pasla v. Australia (Decision adopted on 7 April 1999, sixty-fifth session)*

Submitted by:	Gheorghe Pasla
Alleged victim:	The author
State party:	Australia
Date of communication:	8 September 1995
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 30 May 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 7 April 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Gheorghe Pasla, a citizen of both Romania and Australia. He claims to be a victim of violations by Australia of articles 2, 3, 14, paragraph 1, 16 and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 On 27 November 1985, the author, who was working for the Australian Postal Commission as a driver, had an accident at work. For the injuries he sustained, he was awarded worker's compensation under section 45 of the Compensation Act 1971. In 1988, his worker's compensation was terminated by the Australian Postal Commission by determinations dated 6 June 1988, 23 August 1988 and 28 September 1988, on the ground that the condition suffered by the author was not the result of the injury of November 1985.

2.2 The author subsequently challenged the termination in the federal Administrative Appeals Tribunal (AAT), represented by legal aid lawyers funded by the Legal Aid Commission of Victoria. The author's case was fixed for a hearing before the AAT on 30 April 1990. During the three day hearing, the author had several disagreements with his lawyers, which resulted in their withdrawal from the case. Further hearings were held in December 1990 and in April 1991, both times with the author representing himself. On 22 August 1991, the AAT rejected the author's claim, stating that it was satisfied that the author had no entitlement to compensation after June 1988.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Lord Colville, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the communication.

2.3 The author states that subsequently, on 30 August 1991, he applied for legal aid to appeal the rejection. His request was declined, and the author failed to lodge an appeal to the Federal Court of Australia within the prescribed time-frame of 28 days.

2.4 While still pursuing the case concerning his worker's compensation, the author also, on 18 June 1990, applied for an invalid pension under the Commonwealth Superannuation Scheme pursuant to section 7(1) of the federal Superannuation Act 1976. On 9 March 1993, the author's application was declined by the federal Retirement Benefits Office on the ground that it was not satisfied that the author was totally and permanently incapacitated. The author did not appeal this decision to the AAT.

2.5 On 30 March 1993, the Australian Postal Commission terminated the author's employment. The author applied for social security and was granted a pension on 29 July 1993.

2.6 In January 1994, the author lodged another application to the Legal Aid Commission of Victoria for financial and legal assistance to challenge before the Federal Court both the AAT's decision concerning his worker's compensation and the Retirement Benefits Office's rejection of his application for invalidity payments. At the same time, the author also applied for financial and legal assistance to file a claim of negligence and misconduct against one of his former solicitors and the barrister who represented him in the first hearing before the AAT, and a claim against the Australian Postal Commission for wrongful dismissal. The application was first rejected by the Legal Aid Commission on 9 May 1994, and then on appeal by the Legal Aid Review Committee on 9 August 1994, on the ground that the author's claims lacked merit.

2.7 On 8 August 1995, the author lodged another application for legal aid, this time to the Office of Legal Aid and Family Services in the Attorney-General's Department. The application was denied on 12 September 1995 on the ground that the application contained no new information.

The complaint

3.1 The author alleges to be a victim of violations of articles 14, 16 and 26 of the Covenant as the State party, when declining to give him legal aid in 1991 and 1994, de facto denied him access to court. It is submitted that the rejections of his applications for legal aid denied him the right to appeal the AAT's decision of 22 August 1991 and the Retirement Benefits Office's decision of 9 March 1993, and the right to challenge his dismissal and to sue his former legal advisers for malpractice.

3.2 The author also claims that his rights under the Covenant were violated as the decisions made by respectively the AAT, the Retirement Benefits Office and the Legal Aid Commission of Victoria were unlawful. The author claims, in general terms, that he has been denied justice and that the legal system in Australia is corrupt.

State party's submission and author's comments thereon

4.1 In its submission of 24 October 1997, the State party submits that the whole of this communication should be ruled inadmissible ratione materiae under article 3 of the Optional Protocol on the ground that the right to workers' compensation, the right to invalidity payments, claims for professional negligence, claims for unlawful dismissal and the rights to legal aid in non-criminal matters are not referrable to any right set forth in the Covenant.

4.2 With regard to the author's claims relating to his worker's compensation, the State party submits that these should also be ruled inadmissible ratione temporis on the ground that the author's right to lodge an appeal in this matter before the Federal Court of Australia lapsed on 20 September 1991, while the Optional Protocol entered into force for Australia on 25 December 1991. Reference is made to the jurisprudence of the Committee, in which it is well established that the Optional Protocol can not be applied retroactively.

4.3 With regard to the author's claims that the federal Retirement Benefits Office erred in the application of the federal Superannuation Act 1976 when declining his application for invalidity payments, the State party submits that it should be declared inadmissible ratione materiae under article 3 of the Optional Protocol as the interpretation of the Superannuation Act is a question for domestic authorities and does not engage the jurisdiction of the Committee.

4.4 Finally, the State party submits that the whole of the communication should be ruled inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies. The State party argues

- that the author failed to lodge an appeal in the Federal Court of Australia in relation to the AAT's decision on his worker's compensation payment

- that the author failed to lodge an appeal in the AAT in relation to the federal Retirement Benefits Office's decision to reject his claim for invalidity payments

- that the author failed to commence proceedings in the Australian courts against the Australian Postal Commission for wrongful dismissal and against his former solicitor and barrister for negligence and misconduct

- and that the author failed to seek review of the decisions of the Legal Aid Commission of Victoria and the Office of Legal Aid and Family Services to deny him legal aid in these matters.

The State party submits that these remedies were all effective and available.

5.1 In his submission of 24 February 1998, the author reiterates that he was denied justice by all the previously mentioned authorities and that de facto he was denied access to court when he was denied legal aid. He submits that this constitutes a breach of the Covenant, and that there is no basis for ruling the communication inadmissible ratione materiae.

5.2 With reference to the State party's submission that all claims relating to the decision of 22 August 1991 by the AAT should be declared inadmissible ratione temporis, the author notes that both the federal Retirement Benefits Office and the Australian Postal Commission took the AAT's decision into consideration when they in 1993 respectively denied him invalidity payments and dismissed him from employment. The author submits that this constitutes continuing violations of his rights under the Covenant.

5.3 With regard to the State party's submission that the communication should be ruled inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies, the author argues that the remedies mentioned by the State party were in fact not available or effective as he was denied legal aid.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the author's claim that de facto he was denied access to court through the rejections of his applications for legal aid, the Committee notes, as pointed out by the State party, that the author did not seek review of the decisions taken by the Legal Aid Commission of Victoria and the Office of Legal Aid and Family Services. The Committee therefore finds this part of the communication inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.3 The Committee finds that also the author's claim that the procedure before and the decisions made by respectively the AAT, the Retirement Benefits Office and the Legal Aid Commission of Victoria amounted to denial of justice in violation of the Covenant is inadmissible under article 5, paragraph 2(b), as the author has not exhausted all available domestic remedies.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

R. Communication No. 784/1997, Plotnikov v. Russian Federation (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by: Nicolai S. Plotnikov

Alleged victim: The author

State party: Russian Federation

Date of communication: 13 May 1997

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Nicolai S. Plotnikov, a Russian citizen, born in 1930. He claims that he is the victim of a violation of his right to life by the Russian Federation.

The facts as submitted by the author

2.1 The author states that he suffered from tuberculosis until he was eleven years old, and that only at eleven he learned to sit and walk. He finished his studies at an institute for pedagogics and then found a job as a teacher of physics. He states that he used his savings (27,000 rubles by 1992) to buy expensive medicine, since he suffers from a disease affecting nerves and muscles which if untreated can result in paralysis.

2.2 The author submits that since 1991 he is no longer able to buy the medicine because of the hyperinflation in the Russian Federation. According to the author, the inflation for industrial goods is between 10,000 to 20,000 per cent, but for medicine and medical treatment it reaches 25,000 even up to 80,000 per cent. His savings account has been indexed 60 per cent and as a consequence, he can no longer pay for his medicine, as a consequence of which his health will deteriorate.

2.3 In 1993, the author complained to the Swerdlowsk Regional Court and claimed that his savings had been incorrectly indexed. In its judgement of 20 May 1993, the Court found however that the author's savings had been indexed by the bank in accordance with the law. The Court declined to hold the bank accountable for the devaluation of the author's savings. On 12 July 1993 the Moscow District Court confirmed the judgement, and on 14 October 1993, the Supreme Court dismissed the author's appeal.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

The complaint

3. The author claims that his life is threatened because of lack of money for medicine, caused by a wrong indexing law regarding savings accounts, in violation of article 6 of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the author's claim is based on the level of hyperinflation in the State party and on the indexing law which reduced the value of his savings, thus preventing the author from buying medicine. The Committee notes that the arguments advanced by the author do not substantiate, for purposes of admissibility, that the occurrence of hyperinflation or the failure of the indexing law to counterbalance the inflation would amount to a violation of any of the author's Covenant rights for which the State party can be held accountable.

5. Accordingly, the Human Rights Committee decides

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 830/1998, Bethel v. Trinidad and Tobago (Decision adopted on 31 March 1999, sixty-fifth session)*

Submitted by:	Christopher Bethel (represented by Ashurst Morris Crisp, a law firm in London)
Alleged victim:	The author
State party:	Trinidad and Tobago
Date of communication:	25 August 1998
Prior decisions:	Special Rapporteur's rule 86/91 decision, transmitted to State party on 17 September 1998

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication (dated 25 August 1998) is Christopher Bethel, a Trinidadian citizen, born in 1974 and currently awaiting execution in Port-of-Spain's general penitentiary. He claims to be a victim of a violation of article 26 of the International Covenant on Civil and Political Rights by Trinidad and Tobago. In this context, he also invokes articles 6, 7, 9, 10 and 14 of the Covenant. He is represented by Ashurst Morris Crisp, a law firm in London, United Kingdom.

The facts as submitted by the author

2.1 The author was convicted for murder and sentenced to death on 26 January 1996. His appeal was dismissed by the Court of Appeal on 28 November 1996. His application for leave to appeal to the Privy Council was dismissed on 4 December 1997. With this, all available domestic remedies are said to have been exhausted.

2.2 On 19 December 1997, a petition on behalf of the author was lodged with the Inter-American Commission on Human Rights (IACHR), in accordance with the guidelines issued by the State party in October 1997, which set out a strict timetable to be adhered to by applicants. The author instructed his counsel to lodge an application with the United Nations Human Rights Committee, in case his petition to the IACHR would be unsuccessful.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. The text of an individual opinion by two Committee members is appended to the present document.

2.3 On 26 May 1998, the State party gave notice denouncing the Optional Protocol. It also issued new instructions setting the time periods which should apply to and the procedure for applications made by or on behalf of prisoners under sentence of death between 26 May 1998 and the date that the denunciation would become effective, 26 August 1998. Counsel notes that the author cannot present a communication to the Human Rights Committee after 26 August 1998.[37]

2.4 Counsel notes that in accordance with the State party's instructions, the IACHR should adopt its decision with regard to the author's complaint by 2 September 1998. Counsel notes that by that time the denunciation will have become effective and his client will then no longer have the right of recourse to the Human Rights Committee, despite having had since October 1997 a reasonable expectation to pursue his right of access to the Human Rights Committee.

The complaint

3. Counsel claims that the actions taken by the State party through the denunciation of the Optional Protocol thereby frustrating his client's legitimate expectations constitute a breach of article 1 of the Optional Protocol and of article 26 of the Covenant. He requests the Committee to register the communication for examination under the Optional Protocol so as to guarantee the author's right to petition the Committee if his application to the IACHR were to be rejected.

State party's observations and counsel's comments thereon

4. By submission of 12 October 1998, the State party informs the Committee that the author's case is still under examination by the IACHR. Moreover, the author's counsel has submitted a further application for leave to appeal to the Judicial Committee of the Privy Council. Accordingly, the State party argues that the communication is inadmissible under article 5, paragraph 2 (a) and (b).

5.1 In his reply to the State party's submission, counsel notes that his complaint to the IACHR does not concern the question put before the Committee that the State party has denied his client right of access to the Human Rights Committee. He states that the issue of legitimate expectation is not an issue before the IACHR.

5.2 Counsel confirms that he appeared before the Privy Council on the author's behalf in July and October 1998, but submits that the issue before the Privy Council does not relate to the matter raised in his communication to the Human Rights Committee.

6.1 By further submission of 9 February 1999, the State party explains that following the dismissal of the author's application for leave to appeal to the Judicial Committee of the Privy Council in December 1997, the author had the choice of submitting an application to the IACHR or to the United Nations Human Rights Committee. He chose an application to the IACHR. The State party rejects the allegation that it prevented him from petitioning the Human Rights Committee, and states that it was the author's own choice, for tactical reasons, to petition the IACHR at that time.

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[37] Effective 26 August 1998, Trinidad and Tobago re-acceded to the Optional Protocol, with a reservation to the effect that "the Human Rights Committee shall not be competent to receive and consider any communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected herewith". See _Official Records of the General Assembly, Fifty-third Session, Supplement No. 40_ (A/53/40), vol. I, chap. I, note 2.

6.2 The State party argues that the splitting of petitions between two human rights bodies is an abuse of the right of submission and a ground for inadmissibility under article 3 of the Optional Protocol. In the opinion of the State party, the Committee should not condone a situation where a petitioner seeks to submit some complaints to the IACHR and reserve others for the Committee. When the author submitted his application to the Committee, his petition was still under examination by the IACHR, and the State party thus maintains that his communication to the Committee is inadmissible under article 5, paragraph 2(a), of the Optional Protocol. The State party rejects the suggestion that the author has a right to petition the Committee once his petition to the IACHR is determined. In this connection, the State party notes that the American Convention on Human Rights provides that a communication shall be inadmissible if it is substantially the same as one previously studied by another international organisation.

6.3 The State party further submits that the Judicial Committee of the Privy Council granted the author special leave to appeal on 22 October 1998, and remitted the author's case to the Court of Appeal of Trinidad and Tobago. The Privy Council further directed that if the author's conviction is affirmed by the Court of Appeal, the author is entitled to petition the Judicial Committee. On this basis, the State party argues that domestic remedies have not been exhausted.

7.1 In his comments, counsel for the author contests the State party's argument that the communication is inadmissible because the author has an application before the IACHR. He reiterates that the matter brought before the Committee is the State party's denial of the author's right to petition the Human Rights Committee following the determination of his claim by the IACHR. Counsel recalls that the issue arises from the State party's unilateral decision, some five months after the author's application to the IACHR, to denounce the Optional Protocol.

7.2 Likewise, counsel submits that the complaint raised by the communication to the Committee does not relate to any issue raised before the Privy Council. From the reasons given by the Judicial Committee of the Privy Council allowing the appeal, it appears that the question before it was alleged misbehaviour of counsel at the trial. Counsel requests the Committee, if it were to deem the communication nevertheless inadmissible, to suspend the consideration of the communication pending resolution of the appeal process.

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that counsel argues that the author's right to access to the Committee has been violated by the State party since, if the IACHR were to reject the author's claim, he can no longer petition the Committee due to the State party's denunciation of the Optional Protocol. The Committee considers, however, that the right claimed by the author is not a right protected by the Covenant. Accordingly, the communication is inadmissible under article 3 of the Optional Protocol.

9. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible;

(b) that this decision shall be communicated to the State party and the author's counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

APPENDIX

Individual opinions by Fausto Pocar and Martin Scheinin

(concurring)

Although we agree with the conclusion that the communication is inadmissible, we disagree with the majority in relation to the reasons for inadmissibility. By way of a letter dated 17 September 1998 the State party was informed, in accordance with rule 91 (3) of the Committee's rules of procedure, that if the State party wished to challenge the admissibility of the communication, it should do so within two months, i.e. not later than 16 November 1998. In a submission of 16 October 1998, the State party did challenge the admissibility of the communication on the two grounds specified in article 5, paragraph 2, of the Optional Protocol, namely (a) simultaneous consideration of the same matter under another procedure of international investigation or settlement, and (b) non-exhaustion of domestic remedies. It was only on 9 (and 17) February 1999 that the State party invoked a third ground for inadmissibility, namely abuse of the right of petition (article 3 of the Optional Protocol), without however, adequately substantiating the abusive nature of the communication.

In our opinion the communication should have been declared inadmissible on one of the grounds initially invoked by the State party, namely non-exhaustion of domestic remedies. As a consequence and in accordance with rule 92(2) of the Committee's rules of procedure, the inadmissibility decision should have been made subject to a possibility of review when the obstacle for inadmissibility has been removed. Likewise, the Committee's request for interim measures of protection issued pursuant to rule 86 of the Committee's rules of procedure should have been upheld. This course of action would have made it clear to the author, his counsel and the State party that the State party's withdrawal and reaccession accompanied by reservation, of the Optional Protocol, dated 26 May 1998 and effective 26 August 1998, does not constitute an obstacle for the future consideration of the author's case by the Committee.

In spite of what has been said above, it must be emphasized that the course of action decided by the Committee does not entail a decision that the author would be deprived of access to the Committee under the Optional Protocol, should he wish to submit a new individual communication in order to prevent his execution. Indeed, it is the Committee's position stated in its annual report (see footnote no. 1 of the inadmissibility decision), that the Committee will deal with the validity and legal effect of the reservation by Trinidad and Tobago in due course and in the concrete context of such individual cases related to the death penalty that have been submitted after 26 August 1998. Contrary to what seems to be assumed by the author's counsel (see para. 2.3), the reservation in question cannot be seen to bar, in abstracto, access by the author or any other prisoner under the sentence of death, to the Committee in its functions under the Optional Protocol.

(Signed) Fausto Pocar (Signed) Martin Scheinin

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

T. Communication No. 835/1998, Japhet van den Berg v. the Netherlands (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by:	Johannes and Arie Japhet van den Berg
Alleged victim:	The authors
State party:	The Netherlands
Date of communication:	14 April 1997 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Johannes and Arie Japhet van den Berg, Dutch citizens, born on 11 November 1924 and 10 April 1959, respectively. They claim to be victims of a violation of article 14, paragraph 1, of the Covenant by the Netherlands.

The facts as submitted by the authors

2.1 The authors were shareholders of the firm A. van den Berg (timber merchants).[38] After a long conflict among the shareholders, the other shareholder (who held 50 per cent of the shares), petitioned the Court to have the authors' shares transferred to him, in accordance with articles 2:335-343 of the Civil Code, which enables the transfer of shares if the co-shareholder damages the interests of the company to such an extent that he cannot be allowed to continue.

2.2 By judgement of 17 April 1991, the District Court of the Hague held that the authors had been blocking decision-making in the General Meeting of Shareholders of the firm since 1986 and allowed the transfer of shares. On appeal, the Amsterdam Court of Appeal, by judgement of 10 September 1992, confirmed the judgement of first instance. A further appeal to the Supreme Court was rejected on 8 December 1993. With this, all domestic remedies are said to be exhausted.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

[38] The firm was originally a family business. The three shareholders are related to each other.

2.3 On 13 October 1994, the European Commission on Human Rights rejected the authors' application as inadmissible.[39]

2.4 The authors submit that their behaviour at the shareholders' meetings (withholding approval of the annual accounts) was inspired by the interests of the company, but that the Courts did not take their reasons into account. They further refer to the company's rules and regulations, which provide that all decisions are taken by majority vote, and conclude that all decisions taken by the shareholders' meeting were thus lawful.

The complaint

3. The authors claim that their right under paragraph 1 of article 14 of the Covenant, to a fair hearing by a competent independent and impartial tribunal has been violated, since the Courts did not interpret the evidence and the regulations correctly. In this context, the authors state that they are aware that the Committee cannot examine the question of whether the Courts have correctly interpreted the facts. They argue, however, that fair and impartial justice entails that the Courts interpret the facts correctly and note that in their case, the Courts' decisions are inconsistent with the rules and regulations of the firm. They add that the Court's decision that they blocked decision-making is not borne out by the facts, especially in the light of the company's rules and regulations, and thus violates the principle of impartiality.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee recalls that it is generally not for the Committee but for the Courts of States parties to evaluate the facts and evidence in a specific case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice. The arguments advanced by the authors and the material they provided do not substantiate for purposes of admissibility the claim that the court process was arbitrary or amounted to a denial of justice. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

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[39] No copy of decision provided.

U. Communication No. 844/1998, Petkov v. Bulgaria (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by: Ivan Petkov

Alleged victim: The author

State party: Bulgaria

Date of communication: 20 September 1996 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Ivan Petkov, a Bulgarian citizen. He claims to be a victim of a violation by Bulgaria of paragraph 1 of article 14 and article 26 of the Covenant.

The facts as submitted by the author

2.1 On 5 June 1992, the author was dismissed from his work at the Christo Botev School, apparently for disciplinary reasons. According to the author, his dismissal was unlawful, because it was done without the written consent of the Podkrepa Confederation of Labour.

2.2 On 6 June 1992, the director of the school cancelled the previous order of dismissal. The author, however, refused to receive the second order. He then initiated proceedings before the Kurdjali Regional Court, claiming reinstatement and damages.

2.3 It appears that on 6 July 1992, the author was again dismissed (this time apparently regularly), but this second dismissal order is not the subject of the complaint.

2.4 On 23 November 1992, the Regional Court declared the author's complaint devoid of legal interest, since the order complained of had been cancelled by the School director. This judgement was confirmed by the District Court in a decision of 29 January 1993. The Sofia Supreme Court, on 8 September 1993, referred the case back to the Court of first instance, ruling that the claim was a constitutive one.

2.5 The Regional Court again declared the author's complaint void of legal interest on 3 January 1994. The District Court confirmed this judgement on

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

10 March 1994. The Supreme Court, on 6 December 1994, rejected the author's appeal.

The complaint

3. The author claims that the above shows that his right to fair trial within a reasonable time by an independent and impartial court has been violated, since the courts have refused to rule on the subject matter of his complaint.

Issues and proceedings before the Committee

4.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee notes that the facts submitted by the author show that the domestic courts rejected his claim of unlawful dismissal based on the order of 5 June 1992, since this order had been revoked. The Committee refers to its jurisprudence that it cannot review the facts and evidence evaluated by domestic courts unless it is manifest that the evaluation was arbitrary or amounted to a denial of justice. The arguments advanced by the author and the material he provided do not substantiate his claim that the courts' decisions suffered from such defects. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

5. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

V. Communication No. 850/1999, Hankala v. Finland (Decision adopted on 25 March 1999, sixty-fifth session)*

Submitted by:	E. V. Hankala
Victim:	The author
State party:	Finland
Date of communication:	26 September 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1999,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. E. V. Hankala, a Finnish citizen who claims to be a victim of a violation by Finland of the International Covenant on Civil and Political Rights. No articles are directly invoked. The facts would appear to raise issues under articles 14 and 26 of the Covenant. He claims to be represented by counsel, Mr. Vesa Pajunen although no submissions have ever been received from counsel.

Facts as submitted by the author

2.1 In 1985, a company called M.P.M. Tuote Oy was registered in the commercial register; it absorbed two companies that had gone bankrupt. The founder of the new company was Mr. Hankala, who was also the former director of the two bankrupt companies (Laasti Oy and Puutavraliike A.T. Siren). The new company had three share holders. All shareholders, including Mr. Lehto and Mr. Hankala, signed and deposited bearer bonds with the Union Bank of Finland, as a guarantee for loans received from the Bank.

2.2 During the summer of 1985, the Bank sold the properties and used the proceeds to cancel the two original companies debts. Mr. Lehto filed a claim with the District Court of Pirkkala, alleging that he had been misled by the Bank. On 22 September 1989, the Pirkkala District Court decided that when authorizing the credits to Mauno Lehto and Erkki-Veikko Hankala, the Union Bank of Finland had misled them, and that consequently the Bank was under the obligation to return the real estate bearer certificates he had given the Bank as guarantee to Mauno Lehto.

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* The following members of the Committee participated in the examination of the communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Fausto Pocar, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Mr. Martin Scheinin did not participate in the examination of the communication.

2.3 The Union Bank of Finland appealed the decision to the Turku Court of Appeal, which upheld the decision of the Pirkkala District Court. The Court of Appeal's judgment, handed down on 11 January 1991, was final.

2.4 On 12 March 1990 the Tampere City Court adopted a decision which dismissed the author's claim, although allegedly identical to that of Mauno Lehto, who had been successful in the Pirkkala District Court.

2.5 On 23 August 1991, the Turku Court of Appeal held that the Union Bank of Finland was obliged to return half of the price received from the sale of the property (shares in a housing company) which had been given as guarantee by the author (without the consent of its owner, the author's father). The author filed a petition for leave to appeal with the Supreme Court, which was dismissed on 27 February 1992.

2.6 After the Supreme Court's judgment, the author wrote several letters to the Office of the Chancellor of Justice who did not reply. The author claims that he received misleading information by telephone. He was allegedly informed by the Office of the Chancellor of Justice that the statute of limitation for review by the Supreme Court of its decisions was five years, instead of one year. He claims that this misinformation denied him legal protection in violation of his Covenant rights. He submitted two claims for review of the Supreme Court's judgement, on 12 May 1993 and on 10 March 1994, but both were dismissed. The author also submitted his claim to the Parliamentary Ombudsman, who on 25 November 1994 informed him that procedural errors did not fall within his competence.

2.7 On 2 March 1995, the European Commission of Human Rights, declared the author's case inadmissible on the basis of the six month rule.

2.8 He states that all domestic remedies have been exhausted.

The complaint

3. The author contends that the facts as described above constitute a violation of the Covenant, without invoking any specific articles of the Covenant.

Issues and proceedings before the Committee

4.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2 The Committee considers that the author's allegations of discrimination and denial of his rights to access, on general terms of equality, to a fair hearing in his country have not been substantiated for the purposes of admissibility: the allegations and information before the Committee do not reveal how the author's rights under the Covenant might have been violated. Accordingly, the communication is inadmissible under article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 2 of the Optional Protocol;

(b) that this decision shall be communicated to the author and, for information, to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]